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English Ruling Cases

CITED "E. R. C."

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British Ruling Cases

CITED "B. R. C."

The Extra Annotations following this volume should invariably be examined. They give every citation of the cases reported in this volume of E.R.C. in the decisions of this country and Canada, also in the more important English decisions, indicating which citation the exact point involved and the disposition made by the Court. An additional feature is the analysis and citation of these cases in the leading text books and Annotated Reports.

English Ruling Cases

ARRANGED, ANNOTATED AND EDITED

BY

ROBERT CAMPBELL, M. A.
OF LINCOLN'S INN

ASSISTED BY OTHER MEMBERS OF THE BAR

WITH AMERICAN NOTES

BY

IRVING BROWNE

VOL. XVIII.
MORTGAGE—NEGLIGENCE

EXTRA ANNOTATED EDITION
OF 1916

ROCHESTER, N. Y.
THE LAWYERS CO-OPERATIVE PUBLISHING CO.

1916

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PREFACE TO VOLUME XVIII.

THE selection of the cases and (for the main part) the English notes in this volume are the work of — it is painful to say it — the *late* L. G. GORDON ROBBINS, of the Chancery Bar (author of the recently published book on Mortgages).

Subscribers on both sides of the Atlantic will hear — or will have already learnt — with regret that the late American editor was obliged, on account of health, to give up the work pending the completion of this volume. And with sorrow has now to be recorded the death, while this volume was passing through the press, of Mr. IRVING BROWNE.

The editor on this side must express his sympathy with friends in America, on the loss of his co-editor. As a fellow-labourer he was excellent. His work was systematic, thorough, and prompt; and the constant reader of this work will appreciate his capacity for enlivening the driest topic with a touch of humour. The following note is added by a member of this Bar who had — as the editor regrets he had not — an opportunity of personal acquaintance with Mr. IRVING BROWNE.

R. CAMPBELL.

April, 1899.

NOTE.—I had the advantage of knowing Mr. IRVING BROWNE personally. When he was last in England we had several pleasant interviews, and he was under a semi-promise to come and be my guest during the ensuing summer. I hear of his death with the greatest regret. Frank, straightforward, and singularly apt in speech which was spiced with characteristic humour, he impressed me as a man without a twist to detract from a nature absolutely free from complexity. His death is a great loss to both nations.

F. STROUD.

2 NEW COURT, LINCOLN'S INN,
April, 1899.

NOTE.

The publishers have secured as successor to the late IRVING BROWNE, in annotating this series, the Hon. LEONARD A. JONES, whose reputation as author of standard treatises on Mortgages, Liens, Real Property, &c., assures the maintenance, in the American notes, of a high standard of practical utility.

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RULING CASES.

MORTGAGE.

[The general arrangement and English Notes to this title are by L. G. Gordon Robbins, Reader in Equity to the Inns of Court, author of "Robbins on Mortgages."]

See also "BILL OF SALE," 5 R. C. 1-139; "EQUITABLE TITLE," sections 2 and 3 ("EQUITABLE ASSIGNMENT" and "PRIORITIES"), 10 R. C. 411-570.

SECTION	I.	Essential Character.
SECTION	II.	Grounds of Invalidity.
SECTION	III.	Primary Rights and Obligations of the Mortgagee.
SECTION	IV.	Consequential Rights and Liabilities.
SECTION	V.	Equitable Rules in Favour of the Mortgagor.
SECTION	VI.	Remedies of the Mortgagee.
SECTION	VII.	Priorities.
SECTION	VIII.	Merger and Discharge.

SECTION I. — *Essential Character.*

No. 1. — KING v. KING AND ENNIS.

(TALBOT L. C. 1735.)

RULE.

A MORTGAGE is a contract charging property as security for a debt or loan; every mortgage implies a loan, and every loan implies a debt.

King v. King and Ennis.

3 P. Wms. 358-361.

Mortgage. — Implication of Debt.

Every mortgage, though no covenant or bond to pay the money, im- [358]
plies a loan, and every loan implies a debt; therefore an heir of a mort-
gagor shall compel an application of the personal estate to pay off a mortgage,
notwithstanding there was no covenant, &c., from the mortgagor.

The bill was, that a mortgage made by the testator of a copyhold devised to his nephew might be discharged out of the personal

No. 1. — *King v. King and Ennis*, 3 P. Wms. 358–360.

estate of the testator, and if that not sufficient, out of the rest of the real estate.

The testator, Thomas King, seised in fee of some freehold lands and also of some copyhold lands in Hackney in Middlesex, had mortgaged the copyhold for £550 to the defendant Ennis, who was admitted upon the said mortgage.

[359] The testator made his will, dated the first of July, 1730, whereby reciting that he had surrendered the copyhold to the use of his will, he devised the copyhold premises to his nephew, the plaintiff, and his heirs; and after all his debts paid, he devised all the rest and residue of his estate real and personal to his son, the defendant, Thomas King, and his heirs, leaving his said son executor.

The plaintiff, the nephew, brought his bill against the testator's son and the mortgagee, setting forth that there was a bond for the payment of the mortgage money, which the mortgagee by his answer confessed (and note, this bond was admitted at the hearing at the Rolls), and the words of the will being, "that after all the testator's debts paid, the rest and residue of all his real and personal estate should go to his son," this was said to import, that till all the debts were paid, nothing was devised to such son; or that, when the debts should be paid, then and then only he should be entitled to the residue of the testator's real and personal estate. Whereupon his Honour decreed, that first the personal estate should go to pay off this mortgage debt, and afterwards the real estate devised to the son, and then the rents and profits of the real estate that had been received by the son since the father's death.

And now upon an appeal by the defendant, the son, he did not bring the mortgagee to hearing, and it was neither proved that the testator had surrendered the copyhold to the use of his will, nor that there was any bond or covenant for the payment of the money; consequently, it was objected, 1st, That the copyhold was [360] not well devised by the will. And, 2dly, That this was no debt; and in the case of the South-sea loans, it had been solemnly determined, that the borrowers were not [personally] liable to pay the money borrowed; and that in the case now under consideration, a very great hardship was endeavoured to be thrown upon an only son, who, were he to pay this mortgage debt, would be left destitute; wherefore the demand was not to be favoured in equity.

No. 1. — *King v. King and Ennis*, 3 P. Wms. 360, 361. — Notes.

To which it was answered, and so ruled by the Court, that where a copyholder has mortgaged his copyhold and the mortgagee is admitted, as in the present case, the mortgagor, not having the legal estate of the copyhold in him, has no estate that he can surrender, and therefore may devise the copyhold premises without any surrender.

As to the second point, the Court was of opinion, that every mortgage implies a loan, and every loan implies a debt; and that though there were no covenant nor bond, yet the personal estate of the borrower of course remains liable to pay off the mortgage; and for this was cited a decree of the Lord HARCOURT, in the case of the mortgage of a ship, where the ship was taken at sea, and there was no covenant for payment of the money; and though the ship could not properly be said to be in nature of a pawn or *depositum*, since the mortgagor had sailed with the same to sea, nevertheless the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. Which case the LORD CHANCELLOR said he well remembered, and that it was so in the case of Welsh mortgages, where no day certain *is appointed for [* 361] the payment, but the matter left at large; and that with regard to what had been said of the South-sea loans, it had been always taken, that the company gave credit to the stock only that was pledged, and took no notice of, nor made the least inquiry after, the ability or circumstances of the borrower, but depended entirely upon the stock.

Wherefore the decree of the Rolls was affirmed upon these two points (viz.), that one may devise an equity of redemption of a mortgage of a copyhold, without having surrendered it to the use of the will; and also, that every mortgage implies a debt, for which the mortgagor's personal estate is liable, although there be no bond or covenant for the payment of the mortgage money.

ENGLISH NOTES.

A covenant for payment of the mortgage moneys may be given in express terms, or may be implied from recitals or provisions in the mortgage deed itself. *Eastern Union Railway Co. v. Hart* (Ex. Ch. 1852), 8 Ex. 116, 22 L. J. Ex. 20; or it may be implied from an acknowledgment of the liability in a separate instrument. *Courtney v. Taylor* (1843), 6 Man. & Gr. 851.

Such covenants are not an essential part of the mortgage security.

 No. 1. — *King v. King and Ennis.* — Notes.

Floyer v. Lovington (1714), 1 P. Wms. 268; *Mellor v. Lees* (1742), 2 Atk. 494, 496. The absence of such a covenant in no way affects the mortgagor's right of redemption. *King v. King & Ennis, supra*; *Mellor v. Lees, supra*. If a mortgage deed does not contain any covenant for payment, nor is accompanied by a collateral bond, the debt is a simple contract debt, for which before the Judicature Acts an action of debt or of assumpsit lay. *Yates v. Aston* (1843), 4 Q. B. 182, 3 G. & Dav. 351. See also *Galton v. Hancock* (1744), 2 Atk. 424; *Marchioness of Tweeddale v. Earl of Coventry* (1783), 1 Bro. C. C. 240; *Philips v. Philips* (1787), 2 Bro. C. C. 273; *Astley v. Earl of Tankerville* (1792), 3 Bro. C. C. 545; and *Goodman v. Grierson*, No. 2, p. 6, *post*.

AMERICAN NOTES.

The American doctrine on this subject is thus stated in 1 Washburn on Real Property, p. 46: "As the idea of a mortgage is founded upon the conveyance being by way of security for the payment of money or the like, there must be some evidence of a debt existing from the grantor to the grantee, when the intention is to secure the payment of money, in order to construe such conveyance as a mortgage. This is ordinarily effected by some writing, such as a bond or note given by the grantor to the grantee, for the repayment of the money loaned at the time of making the deed. But such bond or note is not essential, provided there is a debt between the parties capable of being enforced either against the debtor or the property mortgaged." Citing *Russell v. Southard*, 12 Howard (U. S. Sup. Ct.). 139; *Jacques v. Weeks*, 7 Watts (Penn.), 268; *Smith v. People's Bank*, 24 Maine, 185; *Brown v. Dewey*, 1 Sandford Chancery (N. Y.), 56; *Rice v. Rice*, 4 Pickering (Mass.), 349; *Hickox v. Lowe*, 10 California, 197. Story says (*Flagg v. Mann*, 2 Sumner [U. S. Sup. Ct.], 534): "The absence of such a covenant may, in some cases, where the transaction assumes the form of a conditional sale, be important to ascertain whether the transaction be a mortgage or not; but of itself it is not decisive. The true question is, whether there is still a debt subsisting between the parties capable of being enforced in any way, *in rem* or *in personam*." See *Murphy v. Colley*, 1 Allen (Mass.), 108; *Rich v. Doane*, 35 Vermont, 129; *Haines v. Thompson*, 70 Penn. St. 442; *Bennett v. Union Bank*, 5 Humphrey (Tennessee), 615.

It suffices that the debt exists, and it is not essential to the validity of the mortgage that there should be any evidence of it beyond what is furnished by the recitals of the mortgage. 15 Am. & Eng. Enc. of Law, p. 758; *Mitchell v. Burnham*, 14 Maine, 286; *Berger v. Hughes*, 5 Hun (N. Y. Supr. Ct.), 180; *Eachus v. Coshby*, 26 Grattan (Virginia), 112; *Hodgson v. Shannon*, 44 New Hampshire, 572; *Farmers' Loan & T. Co. v. Curtiss*, 7 New York, 466; *Jackson v. Bowen*, 7 Cowen (N. Y.), 13; *Helberg v. Schumann*, 150 Illinois, 12; 41 Am. St. Rep. 339; *Graham v. Stevens*, 34 Vermont, 166; 80 Am. Dec. 675. But the recitals must be unequivocal. *Henry v. Belt*, 5 Vermont, 393.

Some Courts hold that it is not essential, in the absence of statute provision,

No. 1. — King v. King and Ennis. — Notes.

that the mortgage should contain a covenant to pay the debt, in order to enable the mortgagee to look to the mortgagor's personalty for any deficiency. 1 Jones on Mortgages, sect. 72; *Dougherty v. McColgan*, 6 Gill & Johnson (Maryland), 275; *Hickox v. Lowe*, 10 California, 197.

But in several States (California, New York, Oregon, Indiana, Minnesota, Michigan, Wyoming), where there is no such covenant nor any separate writing to which the mortgage is collateral, the remedy is by statute restricted to the land. And this seems to be the doctrine independent of statute also in *Drummond v. Richards*, 2 Munford (Virginia), 337; *Hunt v. Lewin*, 4 Stewart & Porter (Alabama), 138; *Conway v. Alexander*, 7 Cranch (U. S. Circ. Sup. Ct.), 218; *Scott v. Fields*, 7 Watts (Penn.), 360; *Hill v. Eliot*, 12 Massachusetts, 26. The cases in Virginia, Alabama, and Pennsylvania hold this explicitly, irrespective of any statute. See, to the same effect, *Hulderman v. Woodward*, 22 Kansas, 734; *Weil v. Churchman*, 52 Iowa, 253; *Von Camp v. Chicago*, 140 Illinois, 361; *Baum v. Tonkin*, 110 Penn. St. 569. Mr. Jones says (2 Mortgages, sect. 1228): "If there be no personal obligation and no personal covenant in the mortgage, then the only remedy is against the property mortgaged." But the mortgagee may recover upon the mortgagor's oral promise to pay the debt: *Tonkin v. Baum*, 114 Penn. St. 414.

As to the nature of a mortgage, the Courts of this country are divided somewhat equally, and nearly by the geographical line of the Mississippi River, between the theory of a vesting of title subject to defeasance, and the theory of a mere security or pledge. Mr. Jones sums the matter up as follows (1 Mortgages, sects. 58, 59): "As a summary of this examination, it will be found that in Alabama, Arkansas, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, and West Virginia, the Courts have adhered to the doctrines of the common law as regards the nature of the mortgage interest and the respective rights of the parties. They regard the mortgage deed as passing at once the legal title to the mortgages, subject to defeasance, as a condition subsequent which divests or defeats the estate on performance of it. The right of possession follows the title so that the mortgagee may enter into possession of the mortgaged property immediately unless restrained by express provision, or necessary implication of the mortgage; and in any case upon breach of the condition he becomes entitled to the possession and may recover it by action.

"In Delaware, Mississippi, and Missouri, the common-law doctrine is so far modified that until breach of the condition and possession taken, the mortgagor is regarded as the owner of the legal estate, not only as against third persons, but as against the mortgagee himself. But upon forfeiture and entry of the mortgagee, he is regarded as having the legal title for the purpose of obtaining satisfaction out of the property.

"In other States the common-law doctrine upon this subject has been wholly abrogated by statute: and both at law and in equity, and both before and after a breach of the condition, a mortgage is regarded as merely a lien upon the property. It passes no title or estate before foreclosure. This is the doctrine of mortgages in California, Florida, Georgia, Indiana, Iowa,

 No. 2. — *Goodman v. Grierson*. 2 Ball & B. 274. — Rule.

Kansas, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico Territory, New York, North Dakota, Oregon, South Carolina, South Dakota, Texas, Utah Territory, Washington, and Wisconsin. In Iowa, Kansas, and Nevada the statutes imply that the parties may by express stipulation give the right of possession to the mortgagee.

“ Grouping the States geographically, it will be noticed that the English doctrine of the nature of mortgages, with slight modifications, prevails east of the Mississippi River in a large majority of the States; while west of the Mississippi, except only in the States of Missouri and Arkansas, the doctrine everywhere prevails that a mortgage passes no estate or right of possession. This change from the common-law rule may be traced to two sources: to the views of the early jurists of New York, who adopted and carried to logical conclusions the opinions of Lord MANSFIELD; and to the civil law established in Louisiana, under which a mortgage is merely a pledge, giving no right of possession. The influence of the civil law is seen in the codes of a few States; but the most potent influence in bringing about this change in the nature of mortgages in the new States and Territories has come from their adoption to a large extent of the code and judicial authorities of the State of New York. As to the nature of a mortgage, the civil-law doctrine, and what may be called the equitable doctrine adopted in New York and the other States mentioned, are practically and essentially the same.”

See notes, No. 41, *post*, p. 379.

 No. 2. — *GOODMAN v. GRIERSON*.

(MANNERS L. C. IRELAND, 1813.)

RULE.

THE test whether a transaction is a mortgage or a conditional sale is the mutuality and reciprocity of the remedies of the parties.

Goodman v. Grierson.

2 Ball & Beatty, 274–280 (12 R. R. 82).

Conditional Sale. — Mortgage. — Distinctions.

[274] Where the grantee of lands subject to a limited power of redemption has not all the remedies of a mortgagee, the conveyance is not a mortgage, but a conditional sale.

Therefore where lands were conveyed in lien and satisfaction of a portion charged on them, with a clause of redemption, if the portion were paid in ten years; there being no covenant for payment of the portion, or any collateral security, a redemption refused after the ten years: for if the produce of a sale of the lands were insufficient to discharge the portion, the grantee could have no remedy against the grantor, to recover the deficiency.

No. 2. — *Goodman v. Grierson*, 2 Ball & B. 274, 275.

Any clause introduced into a mortgage deed to limit the period of redemption, is in equity totally disregarded; as the parties cannot by any such clause restrict the equity of redemption, for it would be an oppression on the mortgagor.

In equity the rule is, once a mortgage and always a mortgage.

In a mortgage, the absence of a covenant of repayment and of a collateral bond cannot vary the transaction, for every mortgage implies a loan, and every loan a debt, for which the mortgagee's personal estate is liable; and although an action of covenant would not lie, still it may be a mortgage.

The absence of a covenant for repayment is a strong circumstance to indicate the intention of the parties to the deed.

The fair criterion in equity to decide whether a deed be a mortgage or not is, are the remedies mutual and reciprocal? Has the grantee all the remedies a mortgagee is entitled to?

James Goodman, the father of the plaintiff, being seised of the lands of Creaghmore, subject to a charge of £1000, to his sister Sarah, the wife of Ralph Higgins, on the 13th of December, 1788, conveyed his interest in those lands to trustees, for Higgins and wife; the deed recited, that the trustees, with the consent and approbation of Higgins and wife, had agreed to accept of the lands of Creaghmore, in lieu and satisfaction of the sum of £1000, and that James Goodman, in consideration thereof, and in lieu and satisfaction of the said sum of £1000, had agreed to assign his interest in the lands to the trustees, but subject to redemption as thereafter mentioned. The deed then contained a covenant, that if James Goodman, his heirs. &c., should at any time after, within the space of ten years next ensuing the date thereof, pay the said sum of £1000, that the trustees would re-convey to him the lands.

Higgins went into possession of the lands: in May, 1797, James Goodman died intestate, leaving the plaintiff, his eldest son and heir-at-law, a minor. Higgins and wife died soon after, and the defendant has become entitled to the lands under the will of Higgins: a tender was made to him of £1000, in 1803, on behalf of the plaintiff, which he refused, and in April, 1811, the bill was filed on behalf of the plaintiff, a minor, for a redemption.

* The Attorney-General, Mr. Plunket, Mr. Whitestone, [*275] and Mr. Wallace, for the plaintiff: —

The question is, was this conveyance intended to be a mortgage, or a sale of those lands? If a mortgage, the plaintiff is clearly entitled to a redemption; Higgins was entitled to receive a precise

 No. 2. — *Goodman v. Grierson*, 2 Ball & B. 275, 276.

sum of money, as the portion of his wife; the transaction was not then originally for a sale, but for a mere security of money; the deed does not state the assignment to have been absolutely in satisfaction of the portion, but subject to redemption, and therefore a mortgage or a security for money. Where there is a loan, there is a covenant for re-payment; in this case there is no such covenant, for there was no loan; but the debt being due, the conveyance was executed as a security for it, and the conveyance grew out of the debt, but the debt did not grow out of the conveyance.

In *Manlove v. Ball*, 2 Vern. 84, there was an absolute conveyance of a leasehold interest; the purchaser by a separate writing agreed, that if the vendor should, at the end of one year then next ensuing, repay the purchase-money with interest, that he would re-convey to him; the money was not paid within that time, but in twenty years after a bill was filed for a redemption, which was decreed. In *Fulthorpe v. Foster*, 1 Vern. 476, lands were conveyed under an agreement that if the vendor should repay the money in ten years, there should be a re-conveyance; and a redemption was afterwards decreed.

The Solicitor-General, Mr. Joy, and Mr. Ridgeway, for the defendant:

[* 276] * If this were a purchase subject to a re-purchase in ten years, it cannot be considered as a mortgage, for the deed contained no covenant that the grantor would repay the money, nor was there any collateral bond or security, so that the grantee could not have the remedies incidental to every mortgagee; in *Floyer v. Lavington*, 1 P. Wms. 268, it was much relied on, that there was no collateral security, or any covenant to pay the money; and in *Mellor v. Lees*, 2 Atk. 494, Lord HARDWICKE observed, that when there was no covenant in a deed for the re-payment of the mortgage money, it manifested a clear intention of a purchase. We therefore contend, that this transaction was a conditional sale, and never intended to be a mortgage; and that the time limited for the redemption having elapsed, the plaintiff cannot be entitled to the relief he seeks.

The LORD CHANCELLOR (MANNERS).

This is a bill filed for the redemption of premises conveyed by James Goodman, the father of the plaintiff, under the following circumstances:—

No. 2. — *Goodman v. Grierson*, 2 Ball & B. 276–278.

James Goodman, the grandfather, by will, charged his estates with the payment of £1000, for his daughter Sarah, provided she married with consent; she married Ralph Higgins, and the portion became the subject of suit, which was afterwards referred to arbitrators, who awarded £1000, provided it were settled according to a deed executed in 1782. In 1788, James Goodman, the plaintiff's father, on whom the property charged with this portion of £1000 had devolved, entered into a deed with the trustees of the * settlement of 1782, and Higgins and his [*277] wife; reciting the title of said Sarah to the £1000, and that the same had not been paid; and further reciting, that the said trustees, with the approbation of Ralph Higgins and wife, had agreed to accept the lands of Creaghmore, in lieu and satisfaction of the said £1000, so due and unpaid; and that James Goodman, in consideration of the premises, and in lieu and satisfaction of the said sum of £1000, had agreed to assign his interest in the said lands to the said trustees, but subject to redemption, as therein-after mentioned. The deed then proceeds to grant the premises of Creaghmore to the trustees of the settlement of 1782, as a provision for Ralph for life, then to Sarah for life, and then as a provision for the children; then follows this clause: "And the said trustees, with the approbation of the said Ralph and Sarah Higgins, do covenant, promise, and agree with the said James Goodman, his heirs, executors, &c., in manner following; that is, that if the said James Goodman, his heirs, executors, &c., shall at any time hereafter, within the space of ten years ensuing the date hereof, be minded or desirous of re-assuming the said lands of Creaghmore and the rents, issues, and profits thereof, he shall be at liberty so to do, upon payment of the said sum of £1000; and the said trustees shall and will, upon payment of the said sum, re-assign the said premises, and thereupon the trusts of the said deed of 1782 shall be revived, so far as respects the said sum of £1000, as if these presents had not been made."

About a year after the expiration of the ten years, a tender of the £1000 was made, and by the defendant rejected; and the question is, whether this transaction is to be considered as a conditional sale * or a mortgage. As to the time limited [*278] for redeeming, if it be a mortgage, it amounts to nothing; any clause introduced into a mortgage deed, to limit the period of redemption, is totally disregarded by this Court. It is unneces-

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sary to refer to authorities for this; it is too well established, that the parties cannot by any such clause restrict the equity of redemption, to admit of argument; in some of the cases, it is said to be an oppression upon the mortgagor; in others, it is stated, once a mortgage and always a mortgage.

The defendant then contended, that there being no bond collateral to this deed, nor any covenant on the part of the mortgagor to pay the money, it cannot be considered as a mortgage. In answer to that, it is quite clear, that if the intention were that it should be a mortgage, the absence of a covenant and collateral bond would not make it the less so. This was decided in *King v. King*, 3 P. Wms. 358, (p. 1, *ante*), where Lord TALBOT said it did not vary the transaction; for that every mortgage implied a loan, and every loan implied a debt, for which the mortgagor's personal estate was liable; and although an action of covenant would not lie, still it might be a mortgage; and in *Mellor v. Lees*, 2 Atk. 494, Lord HARDWICKE uses nearly the same [*279] language; observing, *however, that the absence of such a covenant was a strong circumstance to indicate the intention of the parties; but if that were the only circumstance, I should not rely upon it to defeat the plaintiff's right to redeem.

The fair criterion, by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this, are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to? I conceive he has not. Suppose, for instance, the defendants to file a bill of foreclosure, by the practice of this Court, the decree is for a sale of the mortgaged premises if they be not redeemed within the time limited by the course of the Court; suppose the sale to take place, and the produce to be insufficient to discharge the £1000 and costs, how is the deficiency to be raised? What remedy could the defendant then have? If it were a mortgage, he in that case might proceed on his covenant or bond; or if no covenant or bond, upon the implied assumpsit; but how could any action be maintained in this case, where the defendants have taken the conveyance, not as a security, but expressly in lieu and satisfaction of the portion of £1000? This appears to me decisive to show, that the transaction between these parties was not that of a mortgage, but a conditional sale; for if the defendants have not all the remedies of a mortgagee, why am I, contrary to the express provisions of this deed, to hold it to be

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a mortgage, and to extend the condition beyond the limit agreed upon by the parties to this deed? There would be much hardship and inconvenience to the one party; and there appears to me to be no substantial ground to entitle the other to relief.

The cases * upon this subject are collected by Mr. Butler [* 280] in a note to his edition of Coke upon Lyttleton, 205 a, note 96.

Bill dismissed without costs.

ENGLISH NOTES.

Mortgages must be distinguished from conveyances by way of sale, subject to a right for the vendor to repurchase within a limited time, or subject to a condition avoiding the conveyance if the vendor pays a certain sum at a fixed period. In the case of a mortgage the right to redeem continues notwithstanding default in payment of the mortgage money on the day fixed until foreclosure; in the case of a conditional sale the right of repurchase is only exercisable upon a strict performance of the condition as to payment on the fixed date, unless such condition is waived: *Pegg v. Wisden* (1852), 16 Beav. 239; or unless the covenant depends on an account not then settled. *Ponsford v. Hankey* (1860), 9 W. R. 353. Otherwise the grantee's estate will become absolute. *Floyer v. Larington* (1714), 1 P. Wms. 268; *Mellor v. Lees* (1742), 2 Atk. 494; see *Davis v. Thomas* (1831), 1 Russ. & Myl. 506, 32 R. R. 257.

It is often difficult to decide whether a particular transaction is a mortgage or a sale qualified by a right to repurchase. In determining the question it must be borne in mind that a mortgage cannot be a mortgage on one side only: it must be mutual, that is, if it is a mortgage with one party it must be a mortgage with both. *Goodman v. Grierson*, *supra*; *Howard v. Harris* (1683), 1 Vern. 192, No. 39, *post*.

A conveyance *ex facie* absolute, and containing nothing to show the relation of debtor and creditor, does not become a mortgage merely because the vendor stipulates in the deed itself, or in a separate instrument, that he shall have a right to repurchase. See *Williams v. Owen* (1840), 5 My. & Cr. 303, 12 L. J. Ch. 207. On the other hand, a conveyance may be absolute in form, but still a mortgage. *Douglas v. Culcerwell* (1862), 4 De G. F. & J. 20, 6 L. T. (N. S.) 272, 10 W. R. 327; *Barnhart v. Greenshields* (1853), 9 Moo. P. C. 18; *Holmes v. Mathews* (1855), 9 Moo. P. C. 413. And the absence of a proviso for redemption will not prevent its being a mortgage. *Bell v. Carter* (1853), 17 Beav. 11. In every case the question is what, upon a fair construction, is the meaning of the instruments. *Alderson v. White* (1858), 2 De G. & J. 97, 105.

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Parol evidence is admissible to show that a conveyance which on the face of it is absolute was intended to be by way of mortgage only. *Marwell v. Lady Montacute*, Prec. Ch. 526; *Hodde v. Healey* (1819), 1 Ves. & Bea. 540, 6 Madd. 181, 22 R. R. 270; *Barton v. Bank of New South Wales* (1890), 15 App. Cas. 379; see *Re Duke of Marlborough, Davis v. Whitehead* (1894), 2 Ch. 133, 63 L. J. Ch. 471, 70 L. T. 314, 42 W. R. 456.

A presumption is raised that the transaction was intended to be a mortgage where it appears that interest was paid: *Allenby v. Dalton* (1835), 5 L. J. K. B. 312; that the purchase-money was not nearly of the value of the property: *Thornborough v. Baker* No. 31, *post*, 3 Swanst. 628, 631; that the expenses of the conveyance were paid by the grantor: *Alderson v. White, supra*; that the right of repurchase is to be exercisable only upon notice to the grantee. *Lawley v. Hooper* (1745), 3 Atk. 278; *Preston v. Neele* (1879), 12 Ch. D. 760, 40 L. T. 303, 27 W. R. 642.

The absence of a personal covenant for payment of principal and interest has in several cases been regarded as indicating that the transaction was intended by the parties to be a conditional sale, not a mortgage. *Floyer v. Lavington* (1714), 1 P. Wms. 268; *Mellor v. Lees* (1742), 2 Atk. 494. See *Davis v. Thomas* (1831), 1 Russ. & Myl. 506, 32 R. R. 257. So where a deed of assignment on trusts for payment of creditors contained no covenant for payment by the assignor, it was held that the assignees were not to be considered as mortgagees so as to be entitled to foreclosure, but that they could only claim a receiver and to have the trusts of the deed carried into execution under the direction of the Court. *Taylor v. Emerson* (1843), 4 Dr. & War. 117.

So also an equivocal transaction has been treated as an absolute sale subject only to the vendor's limited right of repurchase, where the grantee took possession immediately after conveyance: *Williams v. Owen* (1840), 5 My. & Cr. 303; also where the grantee continued for many years in possession as ostensible owner of the estate. *Longuet v. Seawen* (1749), 1 Ves. Sen. 401, 404; *Tull v. Owen* (1840), 4 Younge & Coll. Ex. 192; *Alderson v. White* (1858), 2 De G. & J. 97.

An absolute conveyance fraudulently obtained may be treated as a mortgage, especially if the relation of solicitor and client exists between the parties. *Douglas v. Culverwell, supra*; *Denton v. Donner* (1856), 23 Beav. 285.

AMERICAN NOTES.

This case is cited in 3 Pomeroy on Equity Jurisprudence, sect. 1194; Jones on Mortgages, sects. 258, 264, 280; 2 Washburn on Real Property, p. 482.

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Intention is the criterion, and this is to be inferred from the circumstances and the conduct of the parties, as well as from the face of the instrument. See *Horbach v. Hill*, 112 United States, 144; *Hughes v. Sheaff*, 19 Iowa, 335; *Edrington v. Harper*, 3 J. J. Marshall, 353; 20 Am. Dec. 145; *Davis v. Stone-street*, 4 Indiana, 101; *Stephens v. Allen*, 11 Oregon, 188; *Gibbs v. Penny*, 43 Texas, 560; *Prinble v. McCormick*, — Kentucky —; *Gassett v. Bogk*, 7 Montana, 585; 1 Lawyers' Reports Annotated, 240; *Pendergrass v. Burris*, (Cal.) 19 Pac. Rep. 187; *Cornell v. Hall*, 22 Michigan, 377; *Smith v. Crosby*, 47 Wisconsin, 160; *Burnside v. Terry*, 45 Georgia, 621; *Henley v. Hotelling*, 41 California, 22; *Chapman v. Turner*, 1 Call (Virginia), 280; 1 Am. Dec. 514; *Clark v. Washington, &c., Ins. Co.*, 100 Mass. 509; 1 Am. Rep. 135 (bill of sale); *Pinch v. Willard*, 108 Michigan, 204; *Bennet v. Holt*, 2 Yerger (Tennessee), 6; 24 Am. Dec. 455; *Youle v. Richards*, 1 Saxton (New Jersey Chancery), 534; 23 Am. Dec. 722; *Conway v. Alexander*, 7 Cranch (U. S. Sup. Ct.), 218, where MARSHALL, Ch. J., said: "In this case the form of the deed is not in itself conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is therefore a necessary ingredient in a mortgage that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence in this case is certainly not to be collected from the deed. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. An action at law for the recovery of the money certainly could not have been sustained; and if to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been produced to justify a decree against him."

The want of mutuality is only important in determining whether the transaction was a mortgage or not. If it was intended as a mortgage the want of mutuality would not defeat its character. *Flint v. Sheldon*, 13 Mass. 443; *Brant v. Robertson*, 16 Missouri, 129; *Swetland v. Swetland*, 3 Michigan, 482; *Glover v. Payn*, 19 Wendell (N. Y.), 518; *Stephens v. Sherrod*, 6 Texas, 294; *Bacon v. Brown*, 19 Connecticut, 29; *Mills v. Darling*, 43 Maine, 565; *Miami Ex. Co. v. U. S. Bank*, Wright (Ohio), 252. *Contra*: *Chase's Case*, 1 Bland (Maryland Chanc.), 206; *Reading v. Weston*, 7 Connecticut, 143.

At an early day it was held that a bill of sale might not be shown to be a mortgage. *Thompson v. Patton*, 5 Littell (Kentucky), 74; 15 Am. Dec. 44; *Bryant v. Crosby*, 36 Maine, 562; 58 Am. Dec. 767. But this is no longer held.

A deed conditioned for support and burial of the grantee, otherwise to be void, is a mortgage. *Cook v. Bartholomew*, 60 Connecticut, 24; 13 Lawyers' Reports Annotated, 452; *Austin v. Austin*, 9 Vermont, 420; *Hoyt v. Bradley*, 27 Maine, 242. The contrary was held in *Bethlehem v. Annis*, 44 New Hampshire, 44; 77 Am. Dec. 700. In *Soper v. Guernsey*, 71 Penn. State, 223, the

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Court said: "It is not an uncommon arrangement for a father to make a conveyance of his farm to one of his sons in consideration of being supported, nursed, and attended during his life. The wisdom of such a contract is very questionable, even where the most entire confidence is felt at the time in the affection of the child. The Son of Sirach pronounces emphatically against it: 'Give not thy son and wife, thy brother and friend, power over thee while thou livest, and give not thy goods to another: lest it repent thee, and thou entreat for the same again. As long as thou livest and hast breath in thee, give not thyself over to any. For better it is that thy children should seek to thee than that thou shouldst stand to their courtesy. In all thy works keep to thyself the pre-eminence; leave not a stain in thine honor. At the time when thou shalt end thy days and finish thy life, distribute thine inheritance.' Ecclesiasticus xxxiii. 19-23. The most striking illustration of the same thing is in the pathetic tragedy of Lear, where the fool confirms the opinion of the wise man of the Apocrypha: 'Would I had two coxcombs and two daughters. If I gave them all my living, I'd keep my coxcombs myself.' One of the evil consequences which seems almost invariably to attach itself to such arrangements is the distressing family discord and lawsuits which spring from them. Many of them have been brought to this Court. It is not always easy to administer justice in such cases in conformity to law. The natural feeling of right prompts to the rule which would hold the child to the strict performance of his part of the contract, and give to the parent the right to recall the gift if he fails. Yet it is not always possible to apply such a rule. The deed may want the essential words to make a condition. A condition in a conveyance may be enforced by ejectment, but a consideration, even amounting to a covenant on the part of the vendor, cannot."

In equity an absolute deed may be shown by parol to have been intended as a mere mortgage. *Washburn v. Merrills*, 1 Day (Connecticut), 139; 2 Am. Dec. 59; *Hodges v. Tennessee, &c. Ins. Co.*, 8 New York, 416; *Ryan v. Dox*, 34 New York, 397; 90 Am. Dec. 696; *Horn v. Keteltas*, 46 New York, 605; *Barry v. Hamburg, &c., Co.*, 110 New York, 1; *Ross v. Norvell*, 1 Washington (Virginia), 14; 1 Am. Dec. 422; *Snarely v. Pickle*, 29 Grattan (Virginia), 27; *Jackson v. Lodge*, 36 California, 28; *Malone v. Roy*, 94 *ibid.* 341; *Houser v. Lamont*, 55 Penn. State, 311; 93 Am. Dec. 755; *Hudson v. Isbell*, 5 Stewart & Porter (Alabama), 67; *Wright v. Bates*, 13 Vermont, 341; *Johnson v. Smith*, 39 Iowa, 549; *Sweet v. Parker*, 22 New Jersey Equity, 453; *Baughner v. Merryman*, 32 Maryland, 185; *Nichols v. Cabe*, 3 Head (Tennessee), 93; *Anthony v. Anthony*, 23 Arkansas, 479; *Holton v. Meighen*, 15 Minnesota, 69; *Ruckman v. Abwood*, 71 Illinois, 155; *Heath v. Williams*, 30 Indiana, 495; *Littlewort v. Davis*, 50 Mississippi, 403; *Libby v. Clark*, 88 Maine, 32; *Schade v. Bessinger*, 3 Nebraska, 140; *Edrington v. Harper*, 33 J. J. Marshall (Kentucky), 354; 20 Am. Dec. 145; *Campbell v. Dearborn*, 109 Mass. 130; 12 Am. Rep. 671; *Klinck v. Price*, 4 West Virginia, 4; 6 Am. Rep. 268; *Logue's Appeal*, 104 Penn. St. 136; *Pough v. Davis*, 96 United States, 332; *Cullen v. Cary*, 146 Mass. 50; *Tower v. Fetz*, 26 Nebraska, 706; 18 Am. St. Rep. 795; *Beroud v. Lyons*, 85 Iowa, 482; *Gillis v. Martin*, 2 Devereux Equity (Nor. Car.), 470; 25 Am. Dec. 729; *Perot v. Cooper*, 17 Colorado, 80; 31 Am. St. Rep. 258; *Wallace v.*

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Smith, 155 Penn. St. 78; 35 Am. St. Rep. 868; *Keithley v. Wood*, 151 Illinois, 566; 42 Am. St. Rep. 265.

Some Courts limit the remedy to equity. *McClane v. White*, 5 Minnesota, 178; *Hogel v. Lindell*, 10 Missouri, 483; *Moore v. Wade*, 8 Kansas, 380; *Bragg v. Massie*, 38 Alabama, 89; 79 Am. Dec. 82.

Others admit the doctrine both at law and in equity. *Fuller v. Parrish*, 3 Michigan, 311; *Kent v. Agard*, 24 Wisconsin, 378; *Plumer v. Guthrie*, 76 Penn. St. 441; *Johnson v. Sherman*, 15 California, 287; *Peugh v. Davis*, 96 United States, 332.

A few Courts deny the doctrine in the absence of fraud, oppression, ignorance, or mistake. *Richard v. Harrill*, 2 Jones' Equity (So. Car.), 209; *Chaires v. Brady*, 10 Florida, 133; *McDonald v. McLeod*, 1 Iredell Equity (Nor. Car.), 221.

In doubtful cases the Courts will hold the transaction a mortgage. *King v. Newman*, 2 Munford (Virginia), 40; *Sears v. Dixon*, 33 California, 328; *Skinner v. Miller*, 5 Littell (Kentucky), 84; *Poindexter v. McCannon*, 1 Devereux Equity (So. Car.), 373; 18 Am. Dec. 591; *Cosby v. Buchanan*, 81 Alabama, 574; *Walker v. McDonald*, 49 Texas, 458; *Fowler v. Stoneum*, 11 Texas, 478; 62 Am. Dec. 490. But where the intention of a conditional sale is clear it will be enforced. *Pennington v. Hanby*, 4 Munford (Virginia), 140; *Bloodgood v. Zeily*, 2 Caines Cases (N. Y.), 124; *King v. Kincey*, 1 Iredell Equity (Nor. Car.), 187; 36 Am. Dec. 40; *Stratton v. Sabin*, 9 Ohio, 28; 34 Am. Dec. 418; *Hagthorp v. Neale*, 7 Gill & Johnson (Maryland), 13; 26 Am. Dec. 594; *Keithley v. Wood*, 151 Illinois, 566; 42 Am. St. Rep. 265. MARSHALL, Ch. J., observes in *Conway v. Alexander*, *supra*: "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the Courts of Chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale; and as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of Courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must be, whether the contract in the specific case is a security for the repayment of money or an actual sale."

For an excellent discussion of the principle and review and citation of authorities, see 3 Pomeroy's Equity Jurisprudence, sect. 1195.

No. 3. — *Tebb v. Hodge and Cutten*, L. R. 5 C. P. 73. — Rule.

No. 3. — *TEBB v. HODGE AND CUTTEN*.

(EX. CH. 1869.)

RULE.

AN agreement in writing duly signed, however informal, by which any property, real or personal, is made a security for a debt due or a present advance, creates a charge on such property, and amounts to an equitable mortgage.

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L. R. 5 C. P. 73-80 (s. c. 39 L. J. C. P. 56).

[73] *Agreement for Lease. — Equitable Mortgage of Fittings and Fixtures.*

The plaintiff agreed to let to one B. premises in Holborn, which B. was to fit up forthwith as a luncheon-bar and restaurant, such fittings to be of the value of £500, and to the plaintiff's satisfaction, and B. was to pay a premium of £1000, upon payment of which, "the premises being fitted up as aforesaid," the plaintiff was to grant B., and B. agreed to take, a lease for twenty-one years; and the plaintiff further agreed to lend or obtain for B., "upon security of the said premises as fitted and licensed," £1000 for two years at 5 per cent. Before any lease was granted or any money paid, B. became bankrupt, and his assignee seized and sold the fittings and fixtures under an order of the Court:

Held (affirming the judgment of the Court of Common Pleas), that, until the execution of the proposed lease, the agreement constituted an equitable contract between the plaintiff and B., that "the premises as fitted and licensed" should stand as a security for the £1,000 premium, and consequently that the plaintiff was entitled to them as equitable mortgage.

Appeal by the defendants against a decision of the Court of Common Pleas.

The first count of the declaration charged the defendants with breaking and entering the plaintiff's house called *The Grays Inn Restaurant*, and destroying and converting the fixtures, fittings, &c., of the plaintiff therein. The second count was for the conversion of the like goods.

The third count stated that, on the 18th of December, 1867, the plaintiff being lawfully possessed of the premises in the agreement thereafter mentioned, an agreement was made and entered into between the plaintiff and one Barrows, as follows, that is to say, — "Agreement made the 18th of December, 1867, between R. P. Tebb, of, &c., of the one part, and J. G. Barrows, of, &c., of the

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other part, whereby Tebb agrees to grant and Barrows to take a repairing lease of The Grays Inn Restaurant, No. 19 High Holborn, comprising, &c., at the clear net rent of £370 per annum; also the small office, &c., at the clear net rent of £80 per annum; for the term of twenty-one years from the 24th of June, 1866, less the last fourteen days thereof, upon the following conditions: Barrows agrees to pay Tebb, his executors, &c., the sum of £1000 on *the granting of the above lease of the above-described [* 7+] premises, being the consideration for the same; also to fit up the said premises forthwith in a substantial and appropriate manner as a first-class luncheon-bar and restaurant, such fittings to be of the value of £500 at least, and to be completed to the satisfaction of Tebb, his executors, &c., on or before the 11th of February next (and in this respect time shall be of the essence of the contract); and, upon payment of the said consideration-money, the said premises being fitted up as aforesaid, Tebb, his executors, &c., will grant the said lease. . . . And Tebb agrees to lend or obtain for Barrows, upon security of the said premises as fitted and licensed, the sum of £1000 for the term of two years from Christmas, 1867, at 5 per cent per annum interest, Barrows to have the option of repaying the said mortgage and interest at any earlier period, by giving six months' notice or on payment of three months' additional interest in lieu of notice: and it is also provided that, if the lessee shall assign or underlet the premises before the expiration of the said two years, it is agreed that the said mortgage of £1000, with interest thereon, shall be paid off and discharged: and it is hereby mutually agreed by and between the said parties that, if Barrows shall fail to carry out all or any of the stipulations and conditions herein contained, or should the rent remain unpaid beyond fifteen days from any quarter-day, or should the premises not be fitted up in the manner and within the time hereinbefore stated, or should the same become vacant or otherwise discontinued to be conducted in the ordinary way as a respectable restaurant and luncheon-bar, then and in each or any of such cases it shall be lawful for Tebb to re-enter and take possession of the premises without the necessity of any formal process at law in as full and complete a manner as if this agreement had never been entered into." And the plaintiff then delivered possession of the said premises in the agreement, mentioned to Barrows under and by virtue of the said agreement and he entered into the premises

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and became possessed thereof under and by virtue of the agreement as tenant thereof to the plaintiff, the reversionary estate and interest therein subject to the said tenancy, then belonging to the plaintiff; and Barrows, under and by virtue of the agreement,

and in performance thereof on his part, fitted up the premises in a * substantial and appropriate manner as a first-class

luncheon-bar and restaurant, with divers appropriate and substantial fittings of great value, to wit, of the value of £1000: and afterwards and whilst Barrows was so possessed of the premises, and during his tenancy, and whilst the plaintiff was so entitled to the reversion of and in the said premises, fixtures, and fittings, subject to the said tenancy of Barrows under the said agreement, the defendants wrongfully severed and removed the said fixtures, and carried away and converted the same to their own use, &c.

The defendants pleaded, amongst other pleas, not guilty, not possessed, and a further plea that, before any of the times when, &c., Barrows became bankrupt, and at the time he so became bankrupt, he had, by the consent and permission of the plaintiff, the true owner thereof, in his possession, order, and disposition divers goods and chattels; to wit, the alleged fixtures in the first count mentioned, and the goods in the second count mentioned, and the alleged fixtures and fittings in the third count mentioned, whereof he was reputed owner, and whereof he had taken upon himself the sale, alteration, and disposition as owner; and the Court of Bankruptcy, duly authorised in that behalf, then duly ordered the same to be sold and disposed of for the benefit of the creditors of the said bankrupt under the said bankruptcy; and thereupon the defendant Hodge, then being the assignee of the estate and effects of Barrows under the said bankruptcy, and the defendant Cutten, as his servant and by his command, sold and disposed of the said goods, &c. Issue thereon.

1. The plaintiff is an auctioneer and estate agent at 139 Cheapside. The defendant Hodge is a gas-chandelier manufacturer, carrying on business in Hatton Garden, and is the assignee of Barrows, a bankrupt. The defendant Cutten is an auctioneer.

2. On the 18th of December, 1867, the agreement set forth in the third count of the declaration was entered into between the plaintiff and Barrows.

3. Barrows took immediate possession of the premises at 19 High

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Holborn in the agreement mentioned, and known as The Grays Inn Restaurant.

4. At the time Barrows took possession of the premises, they * had been recently rebuilt by the plaintiff, and [* 76] Barrows immediately proceeded to fit the same up with fixtures, including those which are the subject of this action, as a restaurant, in pursuance of the agreement.

5. The lease in the agreement mentioned was not executed, nor was the consideration of £1000 in fact paid for the same, nor was a sum of £1000 or any sum, in fact, advanced by the plaintiff to Barrows; but after Barrows had fitted up the premises, the plaintiff at his request inspected the same and expressed his satisfaction, and told Barrows that he was ready to grant him the lease whenever required; and the plaintiff asked Barrows to take up the lease. Barrows replied that he did not wish to take it up just then, as he could deposit the agreement as a security. At the request of Barrows, the plaintiff wrote him a letter.¹ Afterwards, Barrows applied to the plaintiff for liberty to assign the agreement by way of mortgage; but the plaintiff refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of £1000. Barrows never paid any rent.

6. On the 15th of April, 1868, Barrows was adjudicated a bankrupt upon a creditor's petition.

7. On the 5th of May, 1868, the defendant Hodge was appointed creditors' assignee, and he immediately proceeded to take possession of the bankrupt's estate.

8. The only estate given up by the bankrupt to his assignee was, the goods, fixtures, fittings, stock in trade, and effects on the premises, at No. 19 High Holborn; and an application was made to the Court of Bankruptcy for an order under s. 125 of the Bankruptcy Law Consolidation Act, 1849.

9. This order was granted. [A copy thereof was set out.]

10. The defendant Cutten examined the goods, fixtures, fittings, and effects at Nos. 19 and 20 High Holborn, and caused a catalogue of the same to be prepared, and advertised them to be sold by auction on the 20th of May, 1868.

11. Immediately upon the sale being advertised, the plaintiff caused to be served upon the defendants a notice to the effect that he

¹ The letter was not set out in the case.

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claimed the lots numbered 1 to 21 inclusive, and lots 128, [* 77] 129, * and 131, in the said catalogue, and cautioning the defendants not to sell the same.

12. The defendants nevertheless sold the whole of the lots.

13. The order of the Court of Bankruptcy authorising the defendant Hodge to sell was read at the sale, in the presence of the plaintiff.

14. The plaintiff himself bought all the fixtures, viz. lots 1 to 21, and the same were never severed. The other fixtures and fittings sold by the defendants to be severed were purchased by different purchasers and severed by such purchasers from the premises.

15. The defendant Hodge paid rent for the premises up to March, 1868. He afterwards renounced the agreement for a lease, pursuant to s. 131 of 24 & 25 Vict. c. 134, and delivered up the key of the premises to the plaintiff.

16. The plaintiff then brought this action to recover the value of the fixtures claimed by him, and also damages for the trespass to the premises, and for alleged injuries to his reversion.

17. At the trial before MONTAGUE SMITH, J., at the sittings at Westminster after Michaelmas Term, 1868, a verdict was taken for the plaintiff on the first and second counts, damages £150, being the sum realised at the sale of the fixtures, and also for the plaintiff on the third count, damages £10, being the agreed amount of damage done to the premises by the removal of the fixtures; leave being reserved to the defendants to move to have the verdict entered for them, — the Court to draw conclusions of fact.

18. A rule *nisi* was accordingly obtained in Hilary Term, 1869, on the grounds, amongst others, “that the plaintiff was not mortgaged either at law or in equity; and that the goods were in the order and disposition of the bankrupt with the consent of the true owner thereof, within the meaning of the 125th section of the Bankrupt Law Consolidation Act, 1849, and that the order in bankruptcy justified the defendants in selling the goods.”

Parry, Serjt., and Beasley, in Easter Term last, showed cause against this rule, citing *Ex parte Gawan*, 5 D. M. & G. 403, 25 L. J. Bk. 1; *Mather v. Fraser*, 2 K. & J. 536, 25 L. J. Ch. 361; *Hankey v. Vernon*, 2 Cox, Eq. 12; and *Holroyd v. Marshall*, 4 H. L. 191, 33 L. J. Ch. 193.

[* 78] * Montagu Chambers, Q. C. in support of the rule, referred to 1 Powell on Mortgages, 20.

No. 3. — *Tebb v. Hodge and Cutten*, L. R. 5 C. P. 78, 79.

The Court held that the result of the transaction between the parties was, that the plaintiff was equitable mortgagee of the fixtures and fittings as part of the premises comprised in the demise, and that 12 & 13 Vict. c. 106, conferred no title on the defendant Hodge as assignee of Barrows.

Against this decision the defendants appealed.

Bush (Montagu Chambers, Q. C., with him), for the defendants. The judgment of the Court below proceeds upon the assumption that the plaintiff was equitable mortgagee of the premises comprised in the agreement of the 18th of December, 1867. The agreement consists of two parts: 1. An agreement by the plaintiff to grant to Barrows a lease of the premises upon certain terms; 2. An agreement by the plaintiff to lend or to procure for Barrows a loan of £1000 on mortgage of the premises as fitted and licensed. The agreement to demise was for the benefit of both parties; but the agreement for the mortgage was for the benefit of Barrows only. It was optional with him to grant the mortgage or not; and he alone could have enforced performance of that part of the agreement. No lease having been granted, there could be no mortgage either legal or equitable. The position of the plaintiff, at best, could only be that of having a lien for the unpaid purchase-money.

[CHANNELL, B. — The fixtures in question, which were intended to add to the permanent value of the property, may be said to have formed part of the subject of demise to Barrows. If the plaintiff was entitled to a specific performance of the agreement, he had an equitable interest in the fixtures.]

He could only be entitled to enforce by bill for a specific performance the first part of the agreement. There is not a word about fixtures in that part of the agreement which relates to the granting of a lease.

[CHANNELL, B. — The premises demised are The Grays Inn Restaurant, as fitted up. So long as the mortgage endured, the fixtures and fittings were to be part of the security.]

* The mere execution of the agreement did not create a [* 79] mortgage. *Ex parte Coombe, In re Beavan*, 4 Madd. 249 (20 R. R. 294).

[CHANNELL, B. — All that that case shows is, that a parol agreement to deposit a lease when granted, as security for a sum advanced, does not constitute an equitable mortgage.]

Beasley, for the plaintiff, was not called upon.

No. 3. — Tebb v. Hodge and Cutten, L. R. 5 C. P. 79, 80.

KELLY, C. B. — The plaintiff, in December, 1867, entered into an agreement with Barrows (whose assignee in bankruptcy the defendant Hodge is) to grant him a lease for twenty-one years of premises in Holborn of which Barrows was already in possession or of which he was to take immediate possession. One of the terms of the agreement was that Barrows should fit up the premises forthwith in a substantial and appropriate manner as a first-class luncheon-bar and restaurant, such fittings to be of the value of £500 at least, and to be completed to the satisfaction of the plaintiff on or before the 11th of February then next. Barrows being thus in possession, and the fixtures and fittings having been completed to the satisfaction of the plaintiff before April, 1868, the premises were in a condition to entitle Barrows to call for a lease, and to entitle the plaintiff to call upon him to accept a lease; and the plaintiff did in fact offer Barrows a lease. Another term of the agreement upon which the lease was to be granted was, that Barrows should pay £1000 by way of premium. It seems that Barrows was not in a condition to pay that sum; and it was also made a term of the agreement that the plaintiff should advance or procure for him an advance of £1000 for the period of two years, at 5 per cent interest, for which advance "the premises as fitted and licensed" were to constitute the security; and it was further agreed that, if the lessee should assign or underlet the premises before the expiration of the two years, the mortgage of £1000, with interest, should be paid off and discharged. The plaintiff was ready to complete the contract on his part and to grant Barrows the stipulated lease; but Barrows declined to take the lease then, "as he could deposit the agreement as a security." The case states that Barrows afterwards "applied to the plaintiff for liberty to assign the agreement, by way of mortgage; [* 80] but the plaintiff * refused his consent till the lease had been taken up. The plaintiff consented to the agreement being deposited as a security, subject to his claim of £1000." Thus, the plaintiff refused to abandon the grant of the lease for twenty-one years, and to allow the substitution of the agreement as a completion of the transaction. It seems to me to be quite clear that there was an agreement between the parties that, until the lease was executed, the agreement of December, 1867, was to be a security to the plaintiff for all that he was entitled to under it. *Rebus sic stantibus*, the plaintiff could at any moment have

No. 3. — *Tebb v. Hodge and Cutten*, L. R. 5 C. P. 80. — Notes.

enforced the execution of a mortgage for the £1000, inasmuch as there was an equitable contract between him and Barrows that “the premises as fitted and licensed” should stand as a security for that sum. The result, as it seems to me, is, that the plaintiff became equitable mortgagee of the premises with the fittings and fixtures, and the defendants had no right to seize and sell them under the adjudication of bankruptcy against Barrows, and consequently this action is maintainable. The judgment of the Court of Common Pleas must be affirmed.

MELLOR, J., and CHANNELL, PIGOTT, and CLEASBY, BB., concurred.
Judgment affirmed.

ENGLISH NOTES.

On the principle that equity regards that as done which ought to be done, an agreement to secure a past debt or present loan by mortgage, being specifically enforceable, is regarded as creating an immediate charge on the property intended to be comprised in the mortgage as against simple contract creditors. *Matthews v. Cartwright* (1742), 2 Atk. 347; *Burn v. Burn* (1797), 3 Ves. 573; *Tebb v. Hodge*, *supra*.

No particular words are necessary to render an agreement for a mortgage an immediate charge on property, provided that the intention to create a charge sufficiently appears from the instrument or instruments constituting the agreement; and provided that, if the property intended to be comprised in the mortgage is land, the requirements of the Statute of Frauds (29 Car. II. c. 3), s. 4, are complied with.

An immediate charge on property has been held to be created in the following cases: By a power of attorney to receive the rents and profits of land until repayment of a loan: *Spooner v. Sandilands* (1842), 1 V. & C. (C. C.) 390; *Abbott v. Stratten* (1846), 3 J. & L. 603; by a deed appointing a receiver of rents and profits to secure an annuity: *Cradock v. Scottish Provident Institute* (1894), 63 L. J. Ch. 15, 69 L. T. 380 (affirmed C. A. 70 L. T. 718); by a letter stating that money intended to be invested on mortgage of certain lands at interest was in the hands of the writer who was interested in those lands: *Re Crowdy*, *Burges v. Crowdy* (1882), 46 L. T. 71; by a letter authorising a creditor to retain the debtor's title-deeds as security for the debt till the debtor's affairs should be settled: *Fenwick v. Potts* (1856), 8 De G. M. & G. 506; by an acknowledgment of a debt with an undertaking to hold the title-deeds of a house as security for the same: *Baynard v. Woolley* (1855), 20 Beav. 583.

Effect will be given to an intention to create a security, notwithstanding any mistake in the manner of making it: *Re Strand Music*

No. 3. — Tebb v. Hodge and Cutten. — Notes.

Hall Co. (1865), 3 De G. J. & S. 147; *Ex parte Rogers, Re Selby* (1856), 8 De G. M. & G. 271; and securities will take effect according to the intention of the parties, both as to the quantity of the property charged, and the extent of the mortgagor's interest in it: *Wainwright v. Hardisty* (1840), 2 Beav. 363; *Grieceson v. Kirsopp* (1842), 5 Beav. 283; *Woodburn v. Grant* (1856), 22 Beav. 483.

The agreement need not specifically describe the property intended to be comprised in the mortgage, provided such property is sufficiently ascertained or rendered ascertainable: *Smith v. Smith* (1835), 1 Y. & C. Ex. 338; *Priddy v. Rose* (1817), 3 Mer. 86, 17 R. R. 24; see *Eyre v. McDowell* (1861), 9 H. L. Cas. 619; and the charge created by the agreement may extend to after acquired lands. *Metcalf v. Archbishop of York* (1836), 1 Myl. & Cr. 547, 6 L. J. (N. S.) Ch. 65; *Lyster v. Burroughs* (1837), 1 Dr. & Wal. 149.

The intention of the parties as regards the terms and extent of the security may be established by parol evidence. *Banks v. Whittall* (1847), 1 De G. & S. 536, 17 L. J. Ch. 14, 352. Parol evidence is also admissible to prove acts of part performance, so as to exclude the operation of the Statute of Frauds: *Maddison v. Alderson* (H. L. 1883), 8 App. Cas. 467, 476, 52 L. J. Q. B. 737, 49 L. T. 303, 31 W. R. 820; but mere payment by the lender of the amount agreed to be lent on the security of land is not sufficient. *Ex parte Hooper* (1815), 19 Ves. 477, 1 Mer. 7, 13 R. R. 244; *Ex parte Hall, Re Whitting* (C. A. 1879), 10 Ch. D. 615, 48 L. J. Bk. 79, 40 L. T. 179.

An ineffectual attempt to make a legal mortgage which fails for want of some formality, as enrolment or (formerly) presentment of a surrender of copyholds, is valid as an equitable charge, and gives the mortgagee a right to a perfected assurance. *Mestaer v. Gillespie* (1805), 11 Ves. 626, 8 R. R. 261. So a power or warrant of attorney to confess judgment in ejectment, which proved defective as such, was held to create a valid equitable charge. *Dale v. Smithwick* (1690), 2 Vern. 151.

AMERICAN NOTES.

This case is cited by Jones and Washburn, but with no special following in the same circumstances.

It is well settled here that the form of the instrument is not essential; as has been seen, it may be a deed absolute; whenever the intention appears that it was intended as a security, it is always considered in equity a mortgage. *Wheeler v. Morris*, 1 Murphy (Nor. Car.), 116; 3 Am. Dec. 678; *Nugent v. Riley*, 1 Metcalf (Mass.), 117; 35 Am. Dec. 355 (lease); *McKnight v. Gordon*, 13 Richardson Equity (So. Car.), 222; 96 Am. Dec. 164; *Delaire v. Keenan*, 3 Desaussure (So. Car.), 74; 4 Am. Dec. 604; *Matter of Howe*, 1 Paige (N. Y. Ch.), 124; 19 Am. Dec. 395 (agreement for mortgage); *Donald v. Hewitt*, 33 Alabama, 534 (agreement that certain bills should be paid out of proceeds of

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certain property); *Coe v. Columbus, &c. Ry. Co.*, 10 Ohio State, 372; 75 Am. Dec. 518; *New Orleans B. Ass'n v. Adams*, 109 United States, 211 (there must be a present purpose to pledge); in short, as Story says (*Flagg v. Mann*, 2 Sumner [U. S. Cir. Ct.], 533): "If a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Hall v. Mobile & M. Ry. Co.*, 58 Alabama, 10; *Grost v. Packwood*, 39 Federal Reporter, 525; *New Vienna Bank v. Johnson*, 47 Ohio State, 306. See also *Chase v. Peck*, 21 New York, 581; *O'Neal v. Seixas*, 85 Alabama, 80; *Daggett v. Rankin*, 31 California, 321; *Adams v. Johnson*, 11 Mississippi, 258; *Hall v. Hall*, 50 Connecticut, 104; *Osgood v. Osgood*, 78 Michigan, 290; *Poland v. Lamouille V. R. Co.*, 52 Vermont, 144; *Richardson v. Hamlett*, 33 Arkansas, 237; *Oliva v. Bunaforza*, 31 New Jersey Equity, 395; *Boehl v. Wadgymar*, 54 Texas, 589; *Ott v. King*, 8 Grattan (Virginia), 224; *Atkinson v. Miller*, 34 West Virginia, 115; *Campbell v. Roddy*, 44 New Jersey Equity, 244; 6 Am. St. Rep. 889 (fixtures); *Wood v. Holly Man. Co.*, 100 Alabama, 326; 46 Am. St. Rep. 56 (fixtures); *Keithley v. Wood*, 151 Illinois, 566; 42 Am. St. Rep. 265.

On this principle, defective mortgages are cured; as where the name of a trustee is omitted: *McQuie v. Peay*, 58 Missouri, 56; or a seal: *McClurg v. Phillips*, 49 Missouri, 315; or there is no reference to the seal: *Jones v. Brewington*, 58 Missouri, 210; or there is defect of acknowledgment: *Black v. Gregg*, 58 Missouri, 568; or not properly witnessed: *Abbott v. Godfroy*, 1 Michigan, 178; *Lake v. Doud*, 10 Ohio, 415. But not so of an omission of mortgagor to sign: *Goodman v. Randall*, 44 Connecticut, 321.

A defective execution of a corporation mortgage by the agent may thus be cured. *Miller v. Rutland & W. R. Co.*, 36 Vermont, 452; *Welsh v. Usher*, 2 Hill Ch. (So. Car.), 167; 29 Am. Dec. 63; *Love v. Sierra N. L. W. & M. Co.*, 32 California, 639; 91 Am. Dec. 602.

"No technical words are necessary to constitute a mortgage which would be good at law any more than in equity. Any words would be sufficient which serve to show a transfer of the mortgaged property as security for a debt. Whatever language may be used, if it shows that the parties intended a sale of the property as security, the instrument will be construed to be a mortgage": *Jackson v. Rutherford*, 73 Alabama, 157.

A deposit of title-deeds with a memorandum stating that they are to be held as security is an equitable mortgage. *Luch's Appeal*, 44 Penn. St. 519; *Carey v. Rawson*, 8 Massachusetts, 159.

No. 4. — *Russel v. Russel*, 1 Brown Ch. C. 269, 270. — Rule.

No. 4. — *RUSSEL v. RUSSEL*.

(LORDS COMMISSIONERS, 1783.)

RULE.

A MERE deposit of title-deeds by the owner of lands with his creditor for the purpose of securing a debt due on a present advance operates as an equitable mortgage or charge. Parol evidence is admissible to show that the purpose was to secure a debt or advance.

Russel v. Russel.

1 Brown Ch. Cas. 269, 270.

Deposit of Deed. — Security. — Parol Evidence.

[269] Pledge of a lease carried into effect against assignees of a bankrupt. Evidence of the bankrupt, he having had his allowance and certificate, allowed to be read.

A lease having been pledged by a person (who afterwards became a bankrupt) to the plaintiff, as a security for a sum of money lent to the bankrupt, the pledgee bought this bill for a sale of the leasehold estate.

Mr. Lloyd, for the plaintiff, merely stated the case, and that the plaintiff had a lien upon the estate.

Mr. Kenyon, for the defendants, the assignees, insisted the plaintiff's claim was against the law of the land, for that it would be charging land without writing, which is against the fourth clause of the Statute of Frauds.

LORD LOUGHBOROUGH. — In this case it is a delivery of the title to the plaintiff for a valuable consideration. The Court has nothing to do but to supply the legal formalities. In all these cases the contract is not *to be* performed, but is executed.

ASHHURST, LORD COMMISSIONER. — Where the contract is for a sale, and is admitted so to be, it is an equivocal act to be explained, whether the party was admitted as tenant or as purchaser. So here it is open to explanation upon what terms the lease was delivered.

[270] A question arose as to reading the bankrupt's evidence, he having had his allowance and certificate, but the Court suffered it to be read, thinking him not bound to refund.

No. 4. — *Russel v. Russel*, 1 Brown Ch. Cas. 270. — Notes.

An issue was directed to try whether the lease was deposited as a security for the sum advanced by the plaintiff to the bankrupt.

Upon the trial the jury found it was deposited as a security.

ENGLISH NOTES.

It appeared from the reporter's note at the end of the above principal case that this cause came on afterwards before Lord THURLOW, C., on the equity reserved, when his Lordship ordered that the lease should be sold, and the plaintiff paid his money.

Having regard to the requirements of sect. 4 of the Statute of Frauds (29 Car. II. c. 3), it is a general rule that an agreement to give a mortgage on lands, tenements, or hereditaments of any tenure, or on any interest in or concerning them, to secure a debt or advance, must be in writing and signed by the intending mortgagor or his agent.

An exception to this rule prevails in the case of a deposit of title-deeds by the owner of freeholds or leaseholds with his creditor for the purpose of securing either a debt antecedently due, or a sum of money advanced at the time of the deposit; such a deposit operates as an equitable mortgage or charge, giving to the depositee, not merely the right of holding the deeds until the debt is paid, but also an equitable interest in the land itself. A mere delivery of the deeds will have this operation without any express agreement, whether in writing or oral, as to the conditions or purpose of the delivery, as the Court infers the agreement to create a security from the relation of debtor and creditor subsisting between the parties, unless the contrary is shown; and the delivery would be sufficient part performance of such agreement to take the case out of the statute. *Burgess v. Moron* (1856), 2 Jur. (N. S.) 1059. But a verbal agreement for a deposit not accompanied by an actual deposit is void under the statute. *Ex parte Hooper* (1815), 1 Mer. 7, 19 Ves. 477, 13 R. R. 244; *Ex parte Coombe, Re Beavan* (1819), 4 Madd. 249, 20 R. R. 294.

A deposit of copies of court rolls will create an equitable mortgage in the case of copyholds. *Whithead v. Jordan* (1835), 1 Y. & C. Ex. 303.

Under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 81, subject to any registered estates, charges, or rights, the deposit of the land certificate in the case of freehold land, and of the office copy of the registered lease in the case of leasehold land, shall for the purpose of creating a lien on the land to which such certificate or lease relates, be deemed equivalent to a deposit of the title-deeds of the land.

When the *lex loci rei sitæ* does not forbid, and the parties do not

No. 4. — *Russel v. Russel.* — Notes.

contract with reference to any other particular law, and the general law of the place is English, an equitable lien will be created upon land by a deposit of title-deeds. *Varden v. Luckpathy*, 9 Mo. In. App. 303.

Where there is a memorandum of agreement for a security by deposit of deeds, the security will be upheld so as to charge the property, though no deeds have actually been deposited: *Ex parte Sheffield & Union Bank, Re Carter* (1865), 13 L. T. (N. S.) 477; or even though some of them may not have been executed. *Ex parte Orreitt* (1837), 3 M. & A. 153; *Ex parte Smith* (1842), 2 M. D. & De G. 587.

A mere deposit of deeds by way of security, though not accompanied by any memorandum, entitles the depositor to a legal mortgage. *Birch v. Ellames* (1794), 2 Anst. 428, 3 R. R. 601; *Ex parte Wright* (1812), 19 Ves. 255.

AMERICAN NOTES.

Jones cites the principal case (*Mortgages*, § 179), and examines the English authorities.

Equitable mortgage by deposit of title-deeds as security is recognized as a common-law doctrine in *Mauler v. Welch*, 5 Wheaton (U. S. Sup. Ct.), 277; *Jarris v. Dutcher*, 16 Wisconsin, 307; *Carey v. Rawson*, 8 Massachusetts, 159.

But the doctrine is very little adopted here on account of the registry system, with its incidents of notice and evidence. In a few States it has been explicitly rejected: see *Shitz v. Dieffenbach*, 3 Penn. St. 233; *Meador v. Meador*, 3 Heiskell (Tennessee), 562; *Vanneter v. McFaddin*, 8 B. Monroe (Kentucky), 435; *Gothard v. Flynn*, 25 Mississippi, 58; *English v. McElroy*, 62 Georgia, 413; *Hall v. McDuff*, 24 Maine, 311; *Bloom v. Noggle*, 4 Ohio St. 45. See *Bicknell v. Bicknell*, 31 Vermont, 498.

But in a very few instances it has been more or less explicitly sanctioned: *Gale v. Morris*, 29 New Jersey Equity, 222; *First Nat. Bank v. Caldwell*, 4 Dillon (U. S. Cir. Ct.), 311; *Hackett v. Reynolds*, 4 Rhode Island, 512; *Rockwell v. Hobby*, 2 Sandford Chancery (N. Y.), 9; *Jarvis v. Dutcher*, *supra*; *Hutzel Brothers v. Phillips*, 26 South Carolina, 136; 4 Am. St. Rep. 687; *Wilson v. Lyon*, 51 Illinois, 166; *Carpenter v. Gold H. M. Co.*, 65 New York 51 (*obiter*).

In the South Carolina case, the Court said: "The leading case upon this doctrine in England is the case of *Russel v. Russel*, 1 Bro. C. C. 229. In fact, it is from this case we first hear of it. It was followed by *Birch v. Ellames*, 2 Anst. 429, and although it has been violently attacked and denounced as pernicious by eminent English judges, and especially by Lord ELDON and Sir WILLIAM GRANT, yet it now seems to be well settled and firmly established in the English law, and in many of the American States, to a certain extent, to wit, where the title-deeds are deposited as a present security, and with the intent thereby to give a lien upon the land, such deposit shall operate as an equitable mortgage, notwithstanding the Statute of Frauds. The English Courts however have manifested a determined disposition to keep within the letter of the precedents, and not to give the doctrine further extension. And accordingly they have held that a mere parol agreement to make a mortgage,

No. 4. — *Russel v. Russel*. — Notes.

or to deposit a deed for that purpose, will not give any title in equity. There must be an actual and *bonâ fide* deposit of the title-deeds with the mortgagee himself in order to create the lien. These positions will be found sustained, we think, in the following English cases: *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Langston*, 17 id. 230; Lord ELLENBOROUGH in *Doe v. Hanke*, 2 East. 151; *Ex parte Kensington*, 2 Ves. & B. 79; *Ex parte Coombe*, 9 Ves. 117. Also in 4 Kent's Com. 151, and Washburn on Real Property.

"It appears from these authorities that in England, and also in several of the States, that where the title-deeds are actually deposited by the debtor with his creditor upon an advance of money, and perhaps even for an antecedent debt, as a security, that the equitable mortgage will arise without more; the deposit standing in the place of an actual mortgage and dispensing with the necessity of the execution of such mortgage."

Washburn says (citing the principal case): "Indeed, it is not easy to see why such a doctrine should prevail in a country where the system of registration is universal, and where it must be carried out, if at all, in direct violence to the Statute of Frauds": (2 Real Prop. 504). And Jones (Mortgages, sect. 185): "The doctrine therefore may be considered as generally rejected, so far as it sustains a mortgage upon a verbal or implied promise in connection with the deposit of the deeds." Pomeroy cites the principal case, and says: "The basis of fact which exists in England, as described in the footnote, is not found in our law or our practice; and as the doctrine is opposed to all our modes of treating real estate, and especially to our system of registry, it was inevitable that the doctrine of an equitable lien, resulting from a mere deposit of title-deeds with a creditor, should not meet with any general and practical acceptance throughout the United States. Under our system of recording, there is no necessity for the production, nor even for the preservation, of the original title-deeds; owners look to the records as furnishing the real evidence of title, and as exhibiting the true condition of all interests in and claims upon the land which could affect the rights of purchasers or encumbrancers; and to the records all parties go, as a matter of course, even in preference to the original deeds. In fact, no presumption or inference would, in general, be raised from the mere possession of title-deeds by a stranger. It follows that in several of the States, where the question has been judicially examined, the doctrine has been distinctly repudiated or not adopted, as being wholly inconsistent with our statutory system of registry and methods of conveyancing. In a few cases however the English doctrine has been recognized, treated as a subsisting rule of equity jurisprudence, and acted upon. It cannot be affirmed, in my opinion, notwithstanding these decisions, that the rule has been firmly established in either one of the States where the decisions were made; their authority is hardly sufficient to be considered as having finally settled the question in accordance with their views": 3 Pomeroy on Equity Jurisprudence, sect. 1265.

No. 5. — EX PARTE KENSINGTON.

(CH. 1813.)

RULE.

WHERE a deposit of deeds by way of equitable mortgage is accompanied by a memorandum in writing, the terms of the contract created by the deposit must be ascertained solely by reference to the memorandum, but parol evidence is admissible to show a new agreement in respect of a subsequent advance.

Ex parte Kensington.

2 Vesey & Beames, 79-85 (13 R. R. 32).

Equitable Mortgage. — Deposit of Deed.

[79] Equitable mortgage by deposit of deeds extended beyond the original purpose, to advances after an alteration of the firm by implication or parol.

Duncan Hunter on the 19th of March, 1805, deposited with the petitioners, his bankers, several deeds; and signed the following memorandum, addressed to Messrs. Moffatt, Kensington, and [* 80] Styan, Bankers, * London. "London, 19th March, 1805.

Gentlemen, Herewith I beg leave to deposit in your house the deeds and policy of assurance upon the following leasehold property;" (describing it) "to remain with you as a collateral security for the balance of any sum or sums of money which you may at any time advance for my account, and which I hereby oblige myself, heirs, or executors to assign in a legal manner whenever required so to do."

On the 25th of September, 1805, Hunter executed a bond to the same persons in the penalty of £40,000, with condition for payment to them, and in case of any alteration taking place in their firm, then to the persons composing a new firm, if comprising two of the original members, of all sums thereafter in any manner lent unto or advanced on account of said Duncan Hunter by the petitioners.

In December following Moffatt retired from the partnership. On the 6th of August, 1807, Hunter, requiring additional advances, deposited with the petitioners the title-deeds of an estate, called Cromwell Park: and on the 7th of August signed the following

No. 5. — *Ex parte Kensington*, 2 Ves. & Bea. 80-82.

memorandum. "Messrs. Kensington and Co., Gentlemen, I hereby deposit in your hands the title-deeds which I hold of Cromwell Park, as a collateral security for any cash transactions which I have had or may have with your house, and which I agree to assign whenever I am required so to do. London, 7 Aug. 1807."

In March, 1809, Hunter, wanting farther advances, proposed a deposit of other deeds of premises held under the Drapers' Company by lease at a rent of £400 a year, and agreed to assign to the petitioners his interest in £3000 3 per cent Consolidated Bank Annuities, invested * in the names of the Drapers' [* 81] Company and him the said D. Hunter, for securing the due payment of the said rent of £400, and performance of the covenants of the lease, and he signed the following memorandum: "London, 30th March, 1809. Messrs. Kensington, Styan, and Adams, I have lodged in your hands the lease and other deeds belonging to the Old Stock Exchange, which are to lay as a collateral security for any advances which you may make for my account, and which I hereby engage and promise to assign over to you in the regular way when required, as also £3000 3 per cent consols., which are deposited in my name with that of the Drapers' Company, as a security for the ground rent, and which I hereby acknowledge are also to be transferred or assigned over to you when required."

No farther assignments or transfers were made. In July, 1811, Hunter was declared a bankrupt; when a considerable balance being due to the petitioners, and their application, as mortgagees, for a sale under the general order being rejected by the commissioners, the petition was presented, praying a declaration, that the petitioners are to be considered as mortgagees of the estates and the £3000 3 per cents: that the commissioners may take an account of the principal and interest due to the petitioners; and appoint a sale of the mortgaged premises, and the bankrupt's interest in the £3000 stock; and that the moneys to arise from the sales may be applied in reduction of the petitioners' debt, with liberty to prove for the remainder.

Sir Samuel Romilly and Mr. Wilson, in support of the petition.

The questions are, whether this deposit of title-deeds, * with a written agreement, can be held by the petitioners [* 82] as a security for advances after Moffatt retired; secondly, as to the Bank annuities. Your Lordship has gone much farther in

decision than these circumstances ; having held a mutual understanding with reference to securities in the hands of the creditor, sufficient without any express agreement : *Ex parte Langston*, 17 Ves. 227, 1 Rose, 26 (11 R. R. 66), which has been followed in many instances.

Mr. Leach and Mr. Montague, for the assignees.

Here is no agreement, that this deposit in March, 1805, should be a security to the new house, formed afterwards by a change of the firm. At least ~~there~~ must be a clear verbal contract. Here is no written agreement, and no verbal contract of any description.

[* 83] *The LORD CHANCELLOR (LORD ELDON).

It has been so long settled that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, that, whatever I might have thought originally, I must act upon that, as settled law. I have often expressed my surprise, how it came to be so settled ; as judicial decisions are to be found, that a lien upon deeds may exist without giving any right at law to the estate ; and there is a remarkable case in *Peere Williams (Head v. Egerton*, 3 P. Wms. 279) ; where a prior encumbrancer was held to have the interest in the estate : but the Court would not take away the deeds from a subsequent encumbrancer ; allowing all the benefit he could have from those deeds, but giving him no interest in the estate. That decision, however, of *Russel v. Russel* (p. 26 *ante*), by Lord THURLOW, has been followed ever since.

This is the case, not of a mere deposit, but a deposit with a written agreement which must *primâ facie* determine the purpose of the deposit ; and it would be stretching the expression much to construe that as an engagement, that would affect the deeds, not only with regard to the money advanced by the old house, but the advances afterwards to be made by the house, whenever the partners should be changed. It must therefore be considered as having been originally only a collateral security for any money that might become due from the house while the partners remained the same.

[* 84] In the cases alluded to I went the length of stating, *that where the deposit originally was for a particular purpose, that purpose may be enlarged by a subsequent parol agreement ; and this distinction appeared to me to be too thin, that you should not have the benefit of such an agreement, unless you added to the terms of that agreement the fact, that the deeds were put back into the hands of the owner, and a re-delivery of them required ;

No. 5. — *Ex parte Kensington*, 2 Ves. & Bea. 84. — Notes.

on which fact there is no doubt that the deposit would amount to an equitable lien within the principle of these cases.

In this case a bond was given, dated the 25th of September, 1805; at which time they stood with a written contract, affecting these deeds and the estate only to the extent in which Moffatt and Co. should make advances, but with a written contract, arising from the bond, for a personal obligation for the advances, not only of that partnership, but of any other of which two of the original members constituted part. Moffatt retired from the partnership in December following; and this considerable difficulty occurs in the case. Understanding alone, unless in a fair sense amounting to agreement, would not do; and in this case no two of their agreements would admit the same construction. My opinion, however, is, that, if upon the affidavit and examination, taken together, aided by the extreme probability of their intention, I can collect, that what was originally deposited for one purpose should be held as deposited also for the other, with reference to the demand of the subsequent partners, that, though by parol, would be sufficient within these cases.

ENGLISH NOTES.

Although, as laid down in the above case, extrinsic evidence is not admissible to raise an inference contrary to the express language of the document stating the terms on which the deposit was made: see *Ex parte Coombe* (1810), 17 Ves. 369; *Ede v. Knowles* (1843), 2 Y. & C. (C. C.) 172; *Shaw v. Foster* (H. L. 1872), L. R. 5 H. L. 321, 341, 42 L. J. Ch. 49, 27 L. T. 281, 20 W. R. 907; yet parol evidence may be admitted to explain ambiguities in a memorandum of deposit. So where there was an unstamped agreement between the parties, which was inadmissible as evidence, Lord ELDON allowed other parol evidence to be adduced to establish the equitable mortgage. *Hiern v. Mill* (1806), 13 Ves. 114, 9 R. R. 149; see *Ede v. Knowles*, *supra*; *Re Boulter*, *Ex parte National Provincial Bank of England* (1876), 4 Ch. D. 241, 46 L. J. Bk. 11, 35 L. T. 673, 25 W. R. 100.

The charge is restricted to the special purpose specified in the memorandum accompanying the deposit, and the conditions therein must be complied with. *Wylde v. Radford* (1863), 9 Jur. (N. S.) 1169; *Burton v. Gray* (1873), L. R. 8 Ch. 392, 43 L. J. Ch. 229; see *City Bank Case* (1861), 3 De G. F. & J. 629.

Where, however, a deposit is made for a particular purpose specified in the accompanying memorandum, that purpose may be enlarged by a

No. 5. — *Ex parte Kensington.* — Notes.

subsequent agreement, either in writing or proved by parol evidence, without an actual re-delivery; as when deeds are deposited to secure advances by a banking firm, the deposit may be extended by agreement to secure advances made by the bank after a change of partners. There is a constructive re-deposit with each successive firm. But there is no presumption of such agreement. *Ex parte Kensington, supra*; see *Ex parte Oakes* (1841), 2 M. D. & De G. 234.

If it appears that a deposit of deeds is made for the purpose of gaining credit, it will not cover moneys previously advanced and then due: *Mountford v. Scott* (1823), Turn. & Russ. 274, 24 R. R. 55; unless an intention to cover them appears from the circumstances. *Ex parte Farley* (1841), 1 M. D. & De G. 683.

But the deposit may be a security as well for debts actually due as also for future advances, if such intention is made out by oath uncontradicted, or other sufficient evidence. *Ex parte Mountford* (1808), 14 Ves. 606, 9 R. R. 359; *Ex parte Langston* (1810), 17 Ves. 231, 11 R. R. 69. Generally a verbal agreement for a subsequent advance on a deposit of deeds already made for the purpose of securing an existing debt, constitutes an equitable mortgage as to the subsequent advance. *Ex parte Kensington, supra*; *Ex parte Whitbread* (1812), 19 Ves. 209; see *Ashton v. Dalton* (1846), 2 Coll. 565, No. 7, p. 40, *post*.

The deposit of deeds with the creditor's solicitor for the purpose of preparing a legal mortgage to secure an antecedent debt and future advances, though unaccompanied by any written agreement, will cover future advances. *Bulfin v. Dunne*, 11 Ir. Ch. R. 198.

It is obviously expedient that a deposit of deeds should be accompanied by a memorandum in writing clearly expressing the nature and object of the contract, so as to avoid the risk of dispute and litigation.

Another advantage attending the taking of a memorandum in writing is that, in case the mortgagor becomes bankrupt, and the depositee applies to the Court for an order for sale, he is allowed his costs out of the estate, but not if he has a deposit of deeds without any writing signed by the mortgagor. *Ex parte Brightens* (1818), 1 Swanst. 3; see *Ex parte Barclay* (1855), 5 De G. M. & G. 403.

If deeds are deposited without any accompanying memorandum, or if such memorandum is equivocal, recourse must be had to extrinsic evidence to prove the purpose of the deposit.

The allegation of the relation of a debt to the deposit must be supported by proper evidence at the hearing: *Chapman v. Chapman* (1851), 13 Beav. 308; *Kebell v. Philpot* (1838), 7 L. J. (N. S.) Ch. 237, and unless such relation is found to the satisfaction of the Court, no equitable charge will be held to have been created by the deposit. *Lucas v. Dorrien* (1817), 7 Taunt. 278, 18 R. R. 480; *Ex parte Broderick, Re*

No. 6. — *Wetherell, Ex parte*, 11 Ves. 398. — Rule.

Beetham (C. A. 1887), 18 Q. B. D. 766, 56 L. J. Q. B. 635, 35 W. R. 613.

As between a debtor and his creditor, possession of deeds by the latter generally raises a presumption that they were deposited with him as security for the debt; and the burden of proof lies upon the debtor to rebut the presumption. *Russel v. Russel* (1783), 1 Bro. C. C. 2694, p. 26, *ante*; see *Ex parte Wright* (1812), 19 Ves. 255. This presumption will not apply where a legal mortgagee is in possession of title-deeds relating to property of the debtor other than that expressly comprised in the mortgage deed. *Wardle v. Oakley* (1864), 36 Beav. 27.

But as against third persons, a mere deposit of deeds without a memorandum in writing will create an equitable mortgage only where the possession of the title-deeds can be accounted for in no other manner. *Boxon v. Williams* (1829), 3 Y. & J. 152, 32 R. R. 771. Where the origin of the possession of title-deeds by a bond creditor was not explained, it was held that there was no equitable charge on the lands. *Chapman v. Chapman* (1851), 13 Beav. 308. See *Dixon v. Muckleston* (1872), L. R. 8 Ch. 155, 162, 42 L. J. Ch. 210, 27 L. T. 804, 21 W. R. 178.

AMERICAN NOTES.

Principal case cited, 1 Jones on Mortgages, sect. 181.

No. 6. — WETHERELL, EX PARTE.

(CH. 1805.)

RULE.

IN order to create an equitable charge by deposit of deeds it is not necessary that all the deeds should be deposited.

Wetherell, Ex parte.

11 Vesey, 398-403.

Equitable Mortgage. — Deposit of Part of Deeds.

Equitable mortgage from a deposit of part of the title-deeds, with [398] evidence, not merely parol but in writing, that the object was to create a security upon the whole.

The possession of the deeds is, if no other purpose is shown, evidence of an agreement that the estate itself shall be a security.

John Starforth and his son, Gilbert Starforth, being indebted to the petitioners, bankers at Durham, gave their bond, dated the 15th July, 1800, and by indentures of the same date agreed to give farther security for the sum of £2500 then due to the petitioners, and for farther advances, covenanting that certain premises, mentioned in the schedule, should be a security accordingly; and some securities, belonging to the Starforths, were also assigned.

The petition stated, that in October, 1802, the balance having increased to £5000 and the petitioners applying for farther [* 399] security, Starforth and his son agreed to deposit * the title-deeds of an estate called The Milnhouses, of which Gilbert Starforth, the son, was seised in fee, as an additional security; and accordingly a bundle of papers was sent to the banking-house of the petitioners, represented to be the title-deeds of that estate, which the petitioners put up without examination. They continued to make farther advances until the bankruptcy of Starforth and his son, upon the 6th of August, 1803; after which they discovered that the deeds, deposited as the title-deeds of the Milnhouses estate, relate only to a moiety of that estate, and bring the title no farther down than to the year 1725; and the bankrupts retained the other deeds, and they got into the possession of the assignees.

The prayer of the petitioner was, that the debt, due to the petitioners, may be declared to be charged upon the Milnhouses estate, as well as the other estates, comprised in the indentures of 1800; that those estates may be sold, and the produce of the sale may be applied in discharge of the debt; and that the petitioners may prove the residue.

Gilbert Starforth upon his examination stated, that Boulton, one of the bankers, in conversation expressed their wish to have a regular mortgage of the Milnhouses estate and the other estates, comprised in the indentures of 1800; stating that the title-deeds were in their hands. Upon which Starforth in answer expressed a wish, that there should be a regular mortgage, and communicated their wish to his father, who said, they were unreasonable, and had security enough.

A memorandum was produced, written by Gilbert Starforth, entitled "A Schedule of the Annual Value of the Property of John Starforth and Son given in Security * to Messrs. Mowbray and Co." In that schedule the estate at Milnhouses was the first article.

Mr. Romilly and Mr. Bell, in support of the petition.

If no bankruptcy had happened, the petitioners would have been entitled to a decree for a mortgage; and the assignees must be in the same situation. The ground upon which this sort of case is taken out of the statute (Stat. 29, Car. II. c. 3, s. 4.) is fraud; as if blank papers had been delivered, under the representation that they were the deeds; like the case of a promissory note given, not to pay; a charge upon an estate in Utopia; or any other case of fraud. It is not necessary that the whole complete title should be in the petitioners. The son upon his examination admits that these deeds were delivered as the title-deeds; and though not delivered originally they were left in the hands of the petitioners, with his privity, stating that, when informed that the deeds had been deposited, he made no objection, and expressed his desire to his father that a farther security might be made according to the desire of the petitioners.

Mr. Richards and Mr. Cooke, for the assignees.

This application stands, not upon an agreement for a security upon the estate, but upon this: that the petitioners have the deeds; which are the muniments and evidence of the title. Certainly the Court would not take the deeds out of the hands of the lender. If it was put upon agreement, it would be of no effect, being by parol. In this instance the petitioners have only a few of the deeds. If nothing more than blank paper had been delivered, it could not have the effect of an equitable mortgage.

The party, claiming under a deposit, must * see that what [* 401] is given as a deposit of deeds is really so. It was incumbent upon the petitioners to take care that they had the security they meant to rely upon. The conclusion upon the affidavits, and the circumstance of the possession of these deeds by the bankrupts at the date of the bankruptcy, is, that there was not an agreement for a deposit; which was only of deeds as to a moiety of the estate, not by the owner, but by his father, having no interest himself, and without authority from his son.

The LORD CHANCELLOR (LORD ELDON).

Under all the circumstances of this case there is sufficient evidence in writing (and that is the ground upon which my decision stands) to raise an equitable mortgage of the whole of these estates. It is very well, though it has not been long, settled, that if there has been a delivery of deeds, that in this Court amounts to

 No. 6. — *Wetherell, Ex parte*, 11 Ves. 401, 402.

an equitable mortgage, and the possession of the deeds is, if no other purpose is shown, evidence of an agreement, that the estate itself shall be a security. It has never yet been decided, how far it is necessary to deliver all the title-deeds; or whether that would not be taken to be a sufficient deposit, which could be taken upon looking at the instruments to amount to evidence that the estate was meant to be a security. It is clear, on the other hand, that, if a man has my title-deeds, he cannot without my privity by making a deposit of those deeds oblige me to give a mortgage. He certainly may have the possession of them under such circumstances, that, if he hands them over to a third person, there will be insuperable difficulty in my getting them back from that person. But a mere deposit will not bind me to give him an actual interest in the estate.

[*402] * In the present case, which is not a mortgage, though there was something like a mortgage in 1800, by the father and son, securing £2500 then due, and farther advances, it is alleged by the depositories that the agreement, accompanying the deposit, was made upon the representation that these were the title-deeds of the whole estate. If that agreement was made out by clear, admissible evidence, as against the bankrupts themselves, and therefore against the assignees, this Court would enforce the effect of that contract, compelling them to make good that representation. The son states that he knew nothing of it, but admits that Boulton, one of the bankers, in conversation expressed a wish upon their part, that a regular mortgage should be made, not only of the Milnhouses estate, but of the other estates described in the deed of 1800, stating to him that the title-deeds were in the hands of the bankers. That is an express communication to the son, that they had the deeds. He does not intimate that his father sent them without his privity: on the contrary, he expressed a wish to Boulton that there should be a regular mortgage, and communicated their wish to his father, who said, they were unreasonable, and had security enough. The representation of the son in writing is, that he inserted the Milnhouses estate with the particulars of the other property in mortgage to the bankers: an original paper in his own handwriting, entitled, "A Schedule of the Annual Value of the Property of John Starforth and Son given in Security" to the Bank, stating the Milnhouses and the other estates: not a moiety, but the entirety. Then is it more satisfac-

No. 6. — *Wetherell, Ex parte*, 11 Ves. 402, 403. — Notes.

tory to go upon the effect of the deposit of the deeds, though all, that related to that, passed in parol; or to say, that under the hand of the party it appears that the meaning of the deposit of such of the deeds as were deposited was to *create [*403] a security upon the whole? The evidence is quite sufficient to attach a security upon the whole estate. Make the order.

ENGLISH NOTES.

In the above case the question was, what was the effect of the delivery of the title-deeds to one moiety only of the estate, the title-deeds of the other moiety being retained by the debtor and passing into the possession of his assignees, the mortgagees having understood that the deeds delivered to them related to the entirety. Lord ELDON, C., thought that under the circumstances of that case there was sufficient evidence in writing (and on this he grounded his decision) that there should be a mortgage of the entirety, and consequently he did not determine, to use his own words, "whether that would not be taken to be a sufficient deposit, which could be taken, upon looking at the instruments, to amount to evidence that the estate was meant to be a security." See also *Ex parte Pearce* (1820), 1 Buck. 525; *Ex parte Arkwright* (1843), 3 M. D. & De G. 129.

The equitable mortgagee, by deposit of part of the deeds, was held entitled to security on the property to which they related, although the rest of the deeds remained in the possession of depositor's solicitors: *Ex parte Chippendale* (1835), 2 M. & A. 299; and the deposit was supported, though the absent deed was the conveyance: *Roberts v. Croft* (1857), 2 De G. & J. 1; and where evidence in writing existed that the security was intended upon the whole. *Ex parte Pott* (1843), 7 Jur. 159.

In one case the deposit of the counterpart of a lease by the lessor with a creditor by way of security was held to create a valid equitable mortgage of the fee. *Richards v. Borrett* (1800), 3 Esp. 102.

If part of the deeds are deposited with one person and the remainder with another, each depositee may have a good security: *Roberts v. Croft, supra*; unless there is evidence of a contrary intention. *Ex parte Pearce, supra*.

An equitable mortgage may be created by the deposit of a receipt for purchase-money, containing the terms of the agreement for sale, if no title-deed or conveyance is in the depositor's possession. *Goodwin v. Waghorn* (1835), 4 L. J. (N. S.) Ch. 172.

But a deposit of an attested copy of a deed is not sufficient to create a valid equitable charge. *Ex parte Broadbent* (1834), 1 M. & A. 635.

 No. 7. — *Ashton v. Dalton*, 2 Collyer, 565. — Rule.

Where a debtor deposited title-deeds as security, but afterwards fraudulently removed some of them, and the deeds removed could not be identified, it was held that the creditor was entitled to possession of all title-deeds belonging to the debtor: *Mason v. Morley* (1865), 34 Beav. 475.

If the memorandum accompanying a deposit of deeds refers to deeds not deposited, and other deeds are deposited, the security will attach to the deeds actually deposited: *Ex parte Powell* (1842), 6 Jur. 490. If the memorandum specifies only some of the deeds which are actually deposited, the security will attach to all the deeds deposited: *Ferris v. Mullins* (1854), 2 Sm. & G. 378.

AMERICAN NOTES.

Principal case cited in 1 Jones on Mortgages, sect. 182.

No. 7. — ASHTON *v.* DALTON.

(CH. 1846.)

RULE.

A DEPOSIT of deeds creates an equitable charge on all the property comprised in them, unless a contrary intention is shown.

Ashton v. Dalton.

2 Collyer, 565-567.

Mortgage by Deposit of Deeds. — Property covered by the Security.

[565] A deposit of title-deeds *prima facie* creates an equitable mortgage upon the whole property comprised in them.

A debtor deposited his title-deeds with his creditor until such time as his account should not exceed £100, at which time they were to be restored to him. The debtor died indebted to the creditor in £274. *Held*, that the creditor's lien extended to the whole £274.

Philip Peacock, being indebted to John Ashton in upwards of £200, for goods sold and delivered, deposited with him, on the 13th August, 1827, the title-deeds of property of which he, Peacock, was seised in fee, consisting of three messuages, with the appurtenances, in the town of Huntingdon. The messuages had originally consisted of one house; but in 1815, when Peacock

No. 7. — *Ashton v. Dalton*, 2 Collyer, 565, 566.

purchased them, they were divided into three, and Peacock thenceforth lived in one of them.

At the time of the deposit, a memorandum was signed by Peacock as follows:—

“ I do hereby agree, that the writings of my own dwelling-house, with the title-deeds thereunto belonging, remain in the possession of Mr. John Ashton, St. Ive's, draper, till such time as my account due to him for goods does not exceed the sum of one hundred pounds; at which time they shall be restored to me free from any expenses. Witness my hand, this 13th day of August, 1827.

“ PHILIP PEACOCK.”

During the life of Peacock, the amount was not reduced to £100; and at the time of his death he was indebted to Ashton in the sum of £274 9s. 9d.

Peacock died in 1827, and Ashton in 1833.

The bill was filed by the universal devisee and executrix of Ashton against the devisee for life and infant heir-at-law of James P. Peacock, who was the eldest son and heir-at-law of Philip Peacock, for the purpose of establishing the mortgage, and for a sale.

Mr. Russell and Mr. W. Milne, for the plaintiff.

* Mr. Wigram and Mr. Pitman, for the defendants, contended, first, that the memorandum gave a lien only on the deeds mentioned in it, and not on the lands; secondly, that, if it gave a lien on any of the lands, it only affected the dwelling-house and appurtenances; thirdly, that the security was only for the excess beyond £100.

Mr. Russell. — First. An agreement to deposit title-deeds merely, does not give a mere lien on the deeds. *Peter v. Russell*, 1 Eq. Ca. Ab. 32. Secondly. The words “writings of my own dwelling-house” are only a general description of the deeds. Thirdly. As the debt was not reduced below £100, at the testator's death, the lien subsists for the whole sum due.

The VICE CHANCELLOR (KNIGHT BRUCE). — *Primâ facie*, the deposit of deeds by a debtor constitutes what, in familiar language, is called an equitable mortgage, upon the whole of the property comprised in them. Such a *primâ facie* case being made, it lies upon those who deny it to prove the denial. That is attempted to

 No. 7. — *Ashton v. Dalton*, 2 Collyer, 566, 567. — Notes.

be done in this case by the form of the document. The words are, "writings of my own dwelling-house," and so on. "Writing" is a large word; "title-deeds" is of less extent. The word "writings" includes "title-deeds." But he goes on to say, "with the title-deeds." I think that the intention of the parties is not disappointed by this loose instrument. The lien must be held to extend to the whole title-deeds, and all lands included in those title-deeds.

The next question is, for what amount the lien must be held to subsist. I am of opinion, that, if immediately before the death of Peacock the debt was reduced below £100, there was no lien; but if at that time it exceeded £100, there was a lien for the whole, — the £100, as well as the rest.

[* 567] * With regard to the question of interest, I have some doubt. The original debt did not, in its nature, bear interest. Will the mere deposit of title-deeds, without a legal security, make a debt bear interest which does not in its nature bear interest?

Plaintiffs' counsel then addressed themselves to this last point, but it became unnecessary to decide it.

Declare that the lien of the plaintiff created by the deposit and memorandum of deposit in the pleadings mentioned, extends to the whole of the messuages, &c., comprised in the writings and title-deeds in the memorandum mentioned or referred to. And declare, that the arrangement entered into by the parties to the following effect: namely, that the whole estate shall be sold, and the purchase-money applied as follows: 1st, in payment of the expenses of the sale of making out the title and completing the purchase; 2ndly, in payment of principal and interest due to [the mortgagees, of the other two houses]; 3rdly, in payment of the plaintiffs' and defendants' costs, as between solicitor and client (and if not sufficient to cover the whole, each solicitor to be paid *pari passu*); 4thly, in payment of the sum of £80 to the plaintiff in full of her demand — is for the benefit of the defendant (the devisee for life) and the defendant (the infant); and all parties, by their counsel, requesting the decree, let the said arrangement be carried into effect. . . .

ENGLISH NOTES.

An inference of intention may be drawn that part only of the property comprised in the deposited deeds should be subject to the security:

No. 7. — *Ashton v. Dalton*. — Notes.

Wylde v. Radford (1863), 9 Jur. (N. S.) 1169; see *Ex parte Heathcote* (1842), 2 M. D. & De G. 711; as where the memorandum specified that part only; but other written evidence may be looked at to show the measure of the security: *Ex parte Glyn, Re Medley* (1840), 1 M. D. & De G. 29; *Ex parte Hunt* (1840), 1 M. D. & De G. 139.

Property not included in the documents deposited will not be included against strangers, merely from a false statement of the mortgagor that it was included. *Jones v. Williams* (1857), 24 Beav. 47.

The deposit will affect only the beneficial interest of the debtor, but will include accretions to, or substitutions for, the property affected. *Ex parte Bisdee, In re Baker* (1840) No. 21, *post*, 1 M. D. & De G. 333; *Ex parte Farley* (1841), 1 M. D. & De G. 683.

If the title-deeds of a house employed for purposes of trade are deposited to secure a debt, and the premises are sold together with the goodwill of the business, the deposittee will be entitled to the whole of the purchase-money. *Chissum v. Dewes* (1828), 5 Russ. 29, 29 R. R. 10; *Pile v. Pile* (C. A. 1876), 3 Ch. D. 42, 45 L. J. Ch. 841, 35 L. T. 18, 24 W. R. 1003.

A renewed lease is subject to the same equitable mortgage that affected the former lease exactly as in the case of a legal mortgage.

When an agreement for a lease is deposited by way of security, and a lease is afterwards granted to the depositor upon different terms, it seems that the deposit will not be affected so far as regards the particulars to which the deposit extends. *Ex parte Reid* (1848), 17 L. J. Bk. 19.

A person who has only a limited interest in property cannot of course create a valid charge beyond the limits of his interest, except so far as the creditor having obtained the legal estate can support his security as a purchaser for value without notice, which exception does not apply to an equitable mortgagee by deposit of deeds. See as to deposits of deeds by way of security by tenant for life: *Williams v. Medlicott* (1819), 6 Price, 495; see also *Wallwyn v. Lee* (1803), 9 Ves. 24, 7 R. R. 142.

So also if a trustee deposits the deeds relating to the trust estate as security for his own debt, the claim of the *cestui que trusts* will prevail over that of the deposittee. *Welchman v. Coventry Union Bank* (1860), 8 W. R. 729; *Stackhouse v. Countess of Jersey* (1861), 1 J. & H. 721.

A fortiori, a person who has no interest in property cannot, by depositing the deeds relating thereto, create a valid charge on the property. *Jackson v. Butler* (1742), 2 Atk. 306; see *Spackman v. Foster* (1883), 31 W. R. 548.

If a solicitor deposits his client's deeds the onus falls on the deposittee to prove that the solicitor was duly authorised as agent so to do. *Wall v. Cockerell* (1863), 10 H. L. C. 229.

A deposit of a lease by one of several executors to raise money for

No. 8. — Ex parte Coming, 9 Ves. 115. — Rule.

purposes of administration is valid: *Ex parte Sheffield Union Banking Co.* (1865), 13 L. T. (N. S.) 477; but this rule will not apparently apply to a deposit of title-deeds to freehold lands by virtue of the Land Transfer Act, 1897 (60 & 61 Vict., c. 65), inasmuch as sect. 2 (2) of that Act provides that it shall not be lawful for some or one only of several joint personal representatives without the authority of the Court to transfer real estate.

In cases not falling under the operation of this Act, a deposit with memorandum of charge by an heir or devisee is an alienation *pro tanto*, which will, to the extent of the moneys secured, defeat the rights of the creditors of the ancestor or testator against the mortgaged property, as assets under the Statute 3 & 4 Will. IV., c. 104. *British Mutual Investment Co. v. Smart* (1875), L. R. 10 Ch. 567, 44 L. J. Ch. 695, 32 L. T. 849, 23 W. R. 800.

NO. 8. — EX PARTE COMING.

(CH. 1803.)

RULE.

A VALID deposit of deeds by way of equitable mortgage may be made either to the creditor himself or to some third person over whom the debtor has no control.

Ex parte Coming.

9 Vesey, 115–118 (7 R. R. 149).

Mortgage. — Deposit of Deeds. — Wife of Debtor.

[115] No equitable mortgage by a deposit of deeds with the wife of the debtor.

Loan upon a parol engagement to give security to replace stock by a given day. The positive contract failing by an intervening bankruptcy, proof may be made in respect of the contract implied by law from the loan.

The object of this petition was to be admitted as a creditor under a Commission of Bankruptcy, upon the following transaction, appearing upon the certificate of the commissioners and proved by affidavit.

Previously to the bankruptcy the petitioner agreed to lend the bankrupt £1500: for which purpose he sold out stock of that value, upon condition that the bankrupt should make a security

No. 8. — *Ex parte Coming*, 9 Ves. 115–117.

by way of mortgage to replace the stock within twelve months, and to pay the dividends in the mean time; in pursuance of which agreement the bankrupt deposited title-deeds with his wife; who swore the deeds always from that time remained in a trunk, of which she kept the key, until they were taken away by the messenger.

* Mr. Romilly and Mr. Roupel, in support of the petition [* 116] contended, first, that this was an equitable mortgage, by delivery of the deeds by the bankrupt to his wife, as a deposit, to secure the money lent by the petitioner; 2dly, that as a loan of stock, to be replaced by a certain day, subsequent to the bankruptcy, it might be proved, comparing it to the case of a surety.

Mr. Richards and Mr. Girdlestone, for the assignees, insisted, the circumstances of this case could not be considered an equitable mortgage; and upon the other point, that this was a mere parol engagement to replace stock at a given day, the value of which must be uncertain. In the case of a surety there is a breach, by which the penalty is forfeited, which may be proved as the debt, though he will not be permitted to take more than is actually due. They cited *Ex parte King*, 8 Ves. 334, and *Utterson v. Vernon*, 3 T. R. 539, 4 T. R. 470 (1 R. R. 767).

The LORD CHANCELLOR (Lord ELDON).

I think the real meaning of this agreement was to give a bond and a mortgage. First, if you cannot make anything of the mortgage to charge the real estate, it may be contended upon the effect of the parol agreement, that though it may be said the land is not charged, the petitioner may insist, his money is not charged within the terms of the agreement; and the question will be, whether the terms of the agreement can under those circumstances protect the debtor from the immediate repayment of the money? The petitioner may say, the other put an end to the positive contract; and the only existing contract is that implied by law upon the loan of the money; and then, if there was a demand and refusal, that might be recovered in an action. It is also deserving * consideration, whether demand and refusal are [* 117] necessary; for if the condition, upon which the money was advanced, is not made good at the time, the lender might say at law the condition was refused, as much as if there had been a positive demand; and therefore it is to be considered money lent and advanced in the ordinary way.

 No. 8. — *Ex parte Coming*, 9 Ves. 117, 118. — *Notes*.

Beyond that there is another question, deserving much consideration: whether this is to be considered a deposit? I remember, previously to *Russel v. Russel*, 1 Bro. C. C. 269 (p. 26, *ante*) it was very much doubted, whether a mere deposit of deeds constituted an equitable mortgage, if there was no writing to manifest the purpose; resting altogether upon parol; and it is quite competent to the man who put the deeds into the hands of a creditor, without reference to the debt, afterwards from favour to that creditor to say, they were deposited with him for the purpose of securing his debt; and so all the perjury that the statute, Stat. 29 Car. II., c. 3, s. 4, meant to avoid is introduced; and the rule changed. But Lord THURLOW was of opinion, and that is not now to be disturbed, that the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact that entitled the Court to give an interest. No case has gone the length, though I do not see the reason, that, if the deposit is in the hands of a person, who could fairly be called a third person, abstracted from both, that can be considered a deposit for the creditor, provided that is proved to be the intention. But it is very delicate, when the deposit remains in the hands of the mortgagor himself; and I doubt much whether a mere memorandum, kept in his own possession, and not parted with to the man, in whose favour it is expressed, would take it out of the statute. It is very nearly the same, where the deeds are put into the hands [*118] of the wife of the mortgagor, to keep them as between * her husband and the creditor. It would not be a safe decision to say upon this report that this was a deposit. The utmost extent, to which I could go, would be to direct an inquiry; and that must be by an issue.

The LORD CHANCELLOR said, under the special circumstances of this case, it would be too dangerous to hold that the wife of the bankrupt was to be considered a depository of the deeds for the debt of the petitioner, who therefore could not support his mortgage; but, with reference to the agreement to replace the stock at a particular day, he should be at liberty to prove the amount of his debt.

ENGLISH NOTES.

Upon the principle laid down in the above case an equitable mortgage by deposit of deeds will not generally be effectual, if the deeds are per-

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mitted to be retained by the debtor, unless he declares in writing that he holds the deeds on behalf of the creditor as security for the debt. *Baynard v. Woolley* (1855), 20 Beav. 583. But a debtor borrowed money from a company of which he was secretary on the security of a deposit of deeds which remained in his custody in that capacity, a valid charge on the property was held to have been created. *Ferris v. Mullins* (1854), 2 Sm. & G. 378.

An agreement to give a mortgage, accompanied by the delivery of the deeds to the creditor's solicitor for the purpose of preparing a legal mortgage, will raise the presumption of an intent to create an immediate security and, unless the presumption is rebutted, the delivery will constitute a present equitable mortgage, by deposit of deeds, though the agreement is not in writing. *Ex parte Bruce* (1813), 1 Rose, 374; *Ex parte Wright* (1812), 19 Ves. 258.

Where deeds are handed over to the debtor's own solicitors, pending the preparation and execution of a mortgage to secure a loan from a third person, and then to be handed over to that person, the charge was upheld. *Lloyd v. Attwood* (1859), 3 De G. & J. 614, 651.

The equitable deposit in the hands of one person will not be extended to an advance made by another person, unless the person holding the deeds is a mere trustee and has made no advance. *Ex parte Whitbread* (1812), 19 Ves. 212.

A written memorandum enclosing documents of title kept by the debtor, and not communicated to the creditor, is not sufficient, at all events, against the trustee in bankruptcy, although it may amount to a declaration of trust. *Wilson v. Balfour* (1811), 2 Camp. 579; see *Re Bankhead's Trusts* (1856), 2 K. & J. 560.

SECTION II. — *Grounds of Invalidity.*No. 9. — *ALTON v. HARRISON.**POYSER v. HARRISON.*

(CH. APP. 1869.)

RULE.

A MORTGAGE of lands cannot be impeached merely on the ground that the mortgagor retains the possession and enjoyment thereof. The question whether such a mortgage is fraudulent and void under the Statute 13 Eliz., c. 5,

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depends upon whether the evidence shows as a matter of fact that the mortgage was made with intent, not merely with the result, of delaying, hindering, or defrauding creditors.

Alton v. Harrison.

Poyser v. Harrison.

L. R. 4 Ch. 622-626 (s. c. 38 L. J. Ch. 669; 21 L. T. 282; 17 W. R. 1034).

[622] *Fraudulent Conveyance*. — 13 Eliz. c. 5. — *Fraudulent Preference*. — *Bona Fides*.

A trader debtor being in expectation that a writ of sequestration would issue against him for non-payment of a sum of money ordered to be paid by him into the Court of Chancery, executed a deed of mortgage, which was registered as a bill of sale, vesting substantially all his property in trustees for the benefit of five of his creditors. The deed contained a proviso that the debtor should remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced his possession was to cease. A writ of sequestration was subsequently issued:—

Held (affirming the decision of STUART, V. C.), that the deed was not void under the Statute 13 Eliz., c. 5, notwithstanding the fact that it conveyed the whole of the debtor's property for the benefit of some of his creditors, and that it contained a proviso that the debtor should remain in possession for six months.

This was an appeal from an order of Vice-Chancellor STUART.

On the 8th of June, 1868, an order was made in the above causes that the defendant, T. Lichfield Harrison, who was a nail-maker at Belper, should, on or before the 2nd of November, 1868, bring into Court to the credit of the causes the sum of £1327 7s. 3d., which had been found due from him on account of a breach of trust.

The order was drawn up on the 1st of August, 1868, and served on the defendant on the 1st of October. On the 24th of October, Harrison called a meeting of five of his creditors, not including any of the persons interested in the money ordered to be paid into Court; the result of which was the execution of an indenture dated the 29th of October, 1868.

By this indenture, which was made between T. L. Harrison of the first part, George Spencer and J. N. Harrison, as trustees of the second part, and the five creditors (whose names and debts were set forth in a schedule) of the third part, after reciting, in effect, that

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T. L. Harrison was indebted to such creditors, that they had urgently requested payment of their debts, and that he, being unable to comply with such request, had agreed to give security, witnessed that T. L. Harrison conveyed unto the said trustees, their heirs and * assigns, the hereditaments therein [* 623] mentioned and assigned unto them all his personal effects in and about Lawn Cottage, Belper, which comprised substantially all his property, upon certain trusts; and it was provided that if T. L. Harrison should, on the 29th of April, 1869, pay the said creditors their debts, there should be a re-conveyance and re-assignment; and T. L. Harrison covenanted with the creditors that he would pay their debts on the 29th of April, 1869, with interest thereon. The deed contained covenants that T. L. Harrison had a right to convey and assign, and for further assurance, and the creditors covenanted with T. L. Harrison that they would not sue him in respect of their debts till default should be made in payment. And it was declared that the trustees should stand possessed of the said real and personal estate upon trust to permit and suffer T. L. Harrison, his heirs, executors, administrators, and assigns, to hold, use, occupy, and enjoy the same, and to receive the rents and profits thereof, for the space of six months from the date, but not so as to let in or permit any execution, extent, sequestration, or other process against the said real and personal estate, or any part thereof, or against T. L. Harrison, his heirs, executors, or administrators, in respect thereof, and in case any such should be enforced, or attempted to be enforced, the present clause should thereupon cease and determine. And it was declared that in case of default in payment on the 29th of April, 1869, it should be lawful for the trustees to sell the personal effects, and, after six months' notice to T. L. Harrison, to sell the hereditaments; and that if any sale should take place, the trustees were to hold the proceeds upon trust to pay all expenses, and to satisfy the debts specified in the schedule, and interest and other moneys which should then be due upon the security of the deed, and then to pay the surplus, if any, to T. L. Harrison.

The debts mentioned in the schedule amounted in the aggregate to £1230, and interest from various dates, the earliest of which was the 31st of July, 1867. The deed was executed by all the parties to it, and it was registered as a bill of sale on the 17th of November, 1868.

Default was made by T. L. Harrison in the payment of the money into Court under the order of the 8th of June, 1868. On the 18th of December, 1868, a writ of sequestration was [* 624] issued, * and on the 23rd of December the sequestrators seized the personal estate included in the deed, and at the same time they entered into possession of the hereditaments. On the 24th of December notice was given to the sequestrators that the whole of the property sequestered belonged to the trustees of the deed. On the 28th of January, 1869, the trustees moved that the sequestrators might be ordered to withdraw from the possession of the effects seized; that the same might be delivered to them; that an inquiry might be directed as to the damage which they had sustained by reason of such sequestration; and that an inquiry might be made whether the trustees had any and what interest in the effects, and in the lands and hereditaments comprised in the deed of October, 1868. The sequestrators at the same time moved that they might be at liberty to sell the effects, and, after paying the expenses, be at liberty to pay the balance of the proceeds into Court to the credit of the causes. On these motions an order was made directing an inquiry whether the trustees had any and what interest in the property sequestered.

The chief Clerk, by his certificate, certified that the trustees had not any interest in the property sequestered, nor in the hereditaments comprised in the mortgage deed; and the trustees having moved to vary the certificate, the VICE-CHANCELLOR held that there being no sufficient ground for holding that the mortgage and bill of sale was executed for any other purpose than *bonâ fide* for securing the debts of the five creditors, the certificate must be varied by finding that the trustees under the deed had an interest in the estate. The sequestrators appealed from this decision.

Mr. Mackeson, Q. C., and Mr. W. W. Cooper, for the appellants:—

The deed was fraudulent and void as against the sequestrators. The Statute 13 Eliz., c. 5, declares such deeds void as are made with intent to defeat and delay creditors. If the sequestrators could have come in under the deed with the other creditors the case would have been different, but it was devised with the express object of defeating and delaying the sequestrators. *Henderson v.*

Lloyd, 3 F. & F. 7; *Evans v. Jones*, 11 Jur. (N. S.) 784; [* 625] 3 H. & C. 423. It would clearly have been an *act of

bankruptcy under the Bankruptcy Act, 1849, s. 67, if any of the excluded creditors had filed a petition in bankruptcy upon it. The words in that section are nearly identical with those in the Statute of Elizabeth, and as the deed would have been void in bankruptcy, it follows that it is fraudulent against creditors under the Statute of Elizabeth.

[The Lord Justice GIFFARD. — The objects of the two statutes are different. The bankrupt laws are for the purpose of obtaining an equal distribution of the assets ; the Statute of Elizabeth had no such object.]

The respondents relied on *Holbird v. Anderson*, 5 T. R. 235, and other cases to the same effect, but those cases only prove that a debtor may pay one creditor in preference to another. In the present case there is the additional element of an intent to defeat the other creditors. This is evidenced by the frame of the deed, by which all the property of the debtor is conveyed to the creditors. It is very different from a debtor allowing his creditor to have a *fi. fa.* or an *elegit*, for in that case he takes only a part of the property. There is also an advantage reserved to the debtor by providing that he may keep possession for six months, and the case is made stronger by the fact that the possession is made determinable on the issuing of any writ or sequestration against him.

[They also referred to *Stewart v. Moody*, 1 C. M. & R. 777 ; *Goodricke v. Taylor*, 2 D. J. & S. 135 ; *Ex parte Foxley*, L. R. 3 Ch. 515 ; *Wood v. Dicke*, 7 Q. B. 892 ; *Nunn v. Wilsmore*, 8 T. R. 521 (5 R. R. 434) ; *Riches v. Evans*, 9 C. & P. 640 ; *Hodgson v. Newman*, cited 5 T. R. 236.]

Mr. Dickinson, Q. C., and Mr. Solomon, for the trustees of the deed, were not called on.

Sir G. M. GIFFARD, L. J. : —

There can be no doubt that Harrison executed this deed at a time when he knew that a writ of sequestration would be issued against him. But at the same time there can be no question that the law was laid down by the VICE-CHANCELLOR, in his judgment, * quite accurately, and in accordance with a long [*626] course of authorities, when his Honour said : “ In this, as in all other cases of the same kind, the question is as to the *bona fides* of the transaction. If the deed of mortgage and bill of sale was executed by Harrison honestly for the purpose of giving a security to the five creditors, and was not a contrivance resorted

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to for his own personal benefit, it is not void, but must have effect."

There is no question that under this deed the five creditors are to have the property, and are secured by means of it. Only two arguments have been raised upon the deed; first, on account of the proviso that Harrison should retain possession of the property for six months unless any sequestration or execution was issued against him; and, secondly, upon the fact that the deed comprised the whole of the debtor's property. With respect to the first point, I think the proviso was consistent with the tenor and object of the deed. It was, in effect, a mortgage, not to become absolute for six months unless process should be previously issued against the mortgagor. With respect to the second point, it must be remembered that we are not now dealing with a case in bankruptcy. I asked, during the argument, why proceedings in bankruptcy had not been taken, and the only answer was, that it was desired to try the validity of the deed. If this appeal were to succeed the result would be, that one creditor would be paid in full, and the other creditors entirely left out, which is exactly that which the appellants now complain of as unjust. I have no hesitation in saying that it makes no difference in regard to the Statute of Elizabeth whether the deed deals with the whole or only a part of the grantor's property. If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the Statute of Elizabeth. The appeal must therefore be dismissed with costs.

ENGLISH NOTES.

The effect of sect. 1 of the Statute 13 Eliz., c. 5 (made perpetual by the Statute 29 Eliz., c. 5) is to render void as against the creditors generally of a mortgagor all mortgages which are made with intent to delay, hinder, or defraud the creditors of their just and lawful actions; and also to render void as against the creditors of a settlor, mortgages of interests derived under settlements made with such intent; except as regards estates or interests made or conveyed upon good consideration *bonâ fide* to a person not having notice of the fraudulent intent: see sect. 5 of this Act.

The Statute of Eliz. applies to all such property as may be taken in execution, and therefore to lands whether freeholds, leaseholds, or copyholds which may now be so taken (1 & 2 Vict., c. 110, s. 11), also to goods transferable by delivery, cash, bank-notes, and to stock and

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other choses in action which are now subject to execution (1 & 2 Vict., c. 110, s. 12); see *Barrack v. McCulloch* (1856), 3 K. & J. 110, 26 L. J. Ch. 105, including policies of assurance: *Stokoe v. Cowan* (1861), 29 Beav. 637, 7 Jur. (N. S.), 901, 4 L. T. 695, 9 W. R. 801.

In the case of a security for a loan or debt the mortgage deed itself must generally be for good and valuable consideration, from the nature of the transaction, and therefore so far comes within the protection afforded by sect. 5 of the Act of Eliz.; but questions may arise as to how far a settlement under which the mortgagor's interest is derived comes within that protection. See on this point *Re Johnson, Golden v. Gillam* (1881), 20 Ch. D. 389, 51 L. J. Ch. 154, 46 L. T. 222; (affirmed C. A. 1882), 51 L. J. Ch. 503. See also *Re Ridler, Ridler v. Ridler* (C. A. 1882), 22 Ch. D. 74, 52 L. J. Ch. 343, 48 L. T. 396, 31 W. R. 93; *Green v. Paterson* (1886), 32 Ch. D. 95, 104, 54 L. T. 738, 34 W. R. 728.

Where valuable consideration is given, the conveyance will be supported unless the grantee has notice of the fraud, so that in effect he becomes a party to the intent to defraud creditors. *Keran v. Crawford* (C. A. 1877), 6 Ch. D. 29, 46 L. J. Ch. 729, 37 L. T. 322, 25 W. R. 49; *Re Johnson, Golden v. Gillam, supra*; *Halifax Joint Stock Banking Co. v. Gledhill*, 1891, 1 Ch. 31, 60 L. J. Ch. 181, 63 L. T. 633, 39 W. R. 104.

The question whether, under all the circumstances of the case, a particular deed was or was not executed with intent to delay, hinder, or defraud creditors is a question of fact for the jury. *Henderson v. Lloyd* (1862), 3 F. & F. 7. It is not necessary to prove actual intent to defeat the claims of creditors if the circumstances of the case are such that the deed must necessarily have that effect. *Freeman v. Pope* (1870), L. R. 5 Ch. 538, 545, 39 L. J. Ch. 689, 21 L. T. 816, 18 W. R. 906; *Re Ridler, Ridler v. Ridler* (C. A. 1882), 22 Ch. D. 74, 52 L. J. Ch. 343, 48 L. T. 396, 31 W. R. 93; but the deed will not be invalidated merely because it so turned out that such was the result: *Thompson v. Webster* (1859), 4 Drew. 629; *Freeman v. Pope, supra*; see *Le Lievre v. Gould*, 1893, 1 Q. B. 491, 62 L. J. Q. B. 353, 68 L. T. 626, 41 W. R. 468.

It is well settled that a mortgage of lands of any tenure cannot be impeached merely on the ground of the retention and enjoyment thereof by the mortgagor, unless evidence is forthcoming of his intent to delay, hinder, or defraud his creditors by giving the mortgage. *Saltingstone's Case*, cit. 2 Bulstr. 236; *Lambert's Case*, Shep. Touchst. by Preston. 267.

Every assignment of a man's property, however honest and good the consideration, must diminish the fund applicable for payment of his creditors; but the mortgage, or the settlement, under which the mortgagor derives his title, must be "devised of malice, fraud, or the

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like," to bring it within the statute: per Lord ELLENBOROUGH in *Meux v. Howell* (1803), 4 East, 1 (at p. 13); and see *Gale v. Williamson* (1841), 8 M. & W. 405.

In order to avoid a conveyance under this statute there must be a proved intent to defraud the grantor's creditors generally; so an assignment by an insolvent debtor of all his property, in order to defeat a particular creditor, is not within the statute. *Pickstock v. Lyster* (1815), 3 M. & S. 371, 16 R. R. 300; *Marlow v. Orgill* (1862), 8 Jur. (N. S.) 829. But a mortgagee who took with knowledge that his security was given to avoid the effect of a sequestration was postponed to the persons claiming under the sequestration. *Ward v. Booth* (1872), L. R. 14 Eq. 195, 41 L. J. Ch. 729, 25 L. T. 364, 20 W. R. 880.

The fact that a mortgage comprises the whole of the mortgagor's present property, or even extends to after acquired property, is not of itself sufficient to establish an intent to defeat creditors. *Alton v. Harrison*, *supra*: *Ex parte Games Re Bamford* (C. A. 1879), 12 Ch. D. 314, 40 L. T. 789, 27 W. R. 744. But such fact is a material element as leading to an inference that there must have been the intent. *Shears v. Rogers* (1832), 3 B. & Ad. 362.

Conversely, it is not material whether the grantor was or was not solvent at the date of the conveyance, if an actual intent to defeat creditors and to retain the benefit and enjoyment of the property to the grantor is proved. *Spirett v. Willows* (1864), 3 De G. J. & S. 293; see *Townsend v. Westacott* (1840), 2 Beav. 340.

But a payment which would be a fraudulent preference in bankruptcy is not necessarily within the statute; so that a security given with full knowledge of both parties that the debtor is insolvent, may be a *bona fide* transaction within the meaning of sect. 5. *Middleton v. Pollock*. *Ex parte Elliott* (1876), 2 Ch. D. 104, 45 L. J. Ch. 293.

Retention of the title-deeds by the mortgagor may be submitted to the jury as evidence of fraud. *Doe d. Grimsby v. Bell* (1843), 11 M. & W. 531.

But a mortgage given by a solvent person may be supported, though made without communication with or the knowledge of the mortgagee, though the deeds including the mortgage are retained by the mortgagor or his solicitor. *Doe v. Knight* (1826) 5 B. & C. 671, 29 R. R. 355; *Grugeon v. Gerrard* (1840), 4 Y. & C. Ex. 119.

The statute renders void conveyances made with intent to defraud creditors only as against persons whose actions, &c., may be defrauded or hindered, and the representatives of such persons. An assurance, though fraudulent under the statute, will therefore be valid as against the assignor himself, and as against strangers other than creditors; it will also be valid as against creditors who are cognisant of and take

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part in the arrangement under which the assignment is made. *Steel v. Brown* (1808), 1 Taunt. 381, 9 R. R. 795; *Robinson v. McDowell* (1818), 2 B. & Ald. 134; *Olliver v. King* (1856), 8 De G. M. & G. 110.

In equity an assurance is void if made with a view to defeat future debts. *Stileman v. Ashdown* (1742), 2 Atk. 447; see *Ware v. Gardner* (1869), L. R. 7 Eq. 317, 38 L. J. Ch. 348, 20 L. T. 71, 17 W. R. 439.

When an assurance is once avoided under this statute, subsequent creditors may be let in together with antecedent creditors. *Barton v. Vankeythusen* (1853), 11 Hare, 126, 133; *Strong v. Strong* (1854), 18 Beav. 408; see *Freeman v. Pope* (1870), L. R. 5 Ch. 538, 39 L. J. Ch. 689, 21 L. T. 816, 18 W. R. 906. An assurance may be made under such circumstances as to be void against subsequent creditors, although all the antecedent creditors are paid off; as where it is made to defeat a plaintiff in an action. *Barling v. Bishop* (1860), 29 Beav. 417; or where the grantor immediately afterwards realises all the rest of his property and denudes himself of everything. *Spirett v. Willows* (1864), 3 De G. J. & S. 293, 302; *Freeman v. Pope*, *supra*; or where he makes the assurance on the eve of entering into an hazardous trade. *Mackay v. Douglas* (1872), L. R. 14 Eq. 106, 41 L. J. Ch. 539, 26 L. T. 721, 20 W. R. 652; *Ex parte Russell*, *In re Butterworth* (C. A. 1882), 19 Ch. D. 588, 51 L. J. Ch. 521, 46 L. T. 113, 30 W. R. 584.

Any particular creditor, whether he has a charge or lien on the property or not, may take proceedings under the statute. *Ede v. Knowles* (1843), 2 Y. & C. (C. C.) 172; *Reese River Silver Mining Co. v. Atwell* (1869), L. R. 7 Eq. 347, 20 L. T. 163, 17 W. R. 601.

The right of a creditor under the statute is not lost by delay short of the statutory period of limitation. *Re Muddever, Three Towns Banking Co. v. Muddever* (C. A. 1884), 27 Ch. D. 523, 53 L. J. Ch. 998, 52 L. T. 35, 33 W. R. 286.

The statute applies where the debts were contracted, not by the party making the conveyance, but by the ancestor from whom he derived the estate. *Apharry v. Bodingham*, Cro. Eliz. 350; and a fraudulent conveyance may be made by an executor as well as by an heir. *Doe v. Fallows* (1832), 2 Cr. & Jer. 481, 2 Tyrw. 460.

The form of the decree is that the deed be declared void against the creditors, and that the defendants join in all necessary acts for raising the money for the creditors: *Bott v. Smith* (1856), 21 Beav. 511; and the decree must be on behalf of all the creditors. *Strong v. Strong*, *supra*; *Reese River Silver Mining Co. v. Atwell*, *supra*.

AMERICAN NOTES.

Under the American system the possession is always retained by the mortgagor until default. *Berlack v. Halle*, 22 Florida, 236; 1 Am. St. Rep. 185.

No. 10. — Edwards v. Harben, 2 T. R. 587. — Rule.

The Statute of 13 Elizabeth, c. 5, is re-enacted probably in all the States, but mortgages of land to defraud creditors are probably of rare occurrence, the favorite resort being a general assignment. Undoubtedly a mortgage made to defraud creditors, with foreclosure, is void as against an existing creditor. *Becker v. Bidditt*, 3 A. K. Marshall (Kentucky), 280; 13 Am. Dec. 161; *Sabin v. Columbia Fuel Co.*, 25 Oregon, 15; 42 Am. St. Rep. 756. But if there is no fraud, no presumption of fraud arises from the mere fact that the mortgagee, from motives of kindness and to enable the mortgagor to make money, leaves him in possession. *Bumpas v. Dotson*, 7 Humphreys (Tennessee), 310; 46 Am. Dec. 81. A corporation may mortgage its property to secure advances both present and future, if fairly done, although it turns out that it was unable to pay all its debts in full when the mortgage was made: *Sabin v. Columbia Fuel Co.*, *supra*, citing *United States v. Hoar*, 3 Cranch (U. S. Sup. Ct.), 73, and observing: "Every mortgage necessarily tends to hinder or delay creditors other than the mortgagee, but a delay necessarily resulting from a fair and honest exercise of the right to dominion over one's own property, and to pledge or otherwise dispose of it, is neither an unjust nor unlawful interference with the rights of others, and is not within the terms of the statute making void conveyances to hinder or delay creditors."

No. 10. — EDWARDS v. HARBEN.

(K. B. 1788.)

RULE.

ALTHOUGH an absolute assignment of chattels without transmutation of possession is *primâ facie* void within the Statute 13 Eliz., c. 5, yet where the assignment is by way of mortgage, the retention of the chattels by the mortgagor being consistent with the deed is of itself not evidence of intention "to delay, hinder, or defraud creditors," so as to avoid the mortgage under that Act.

Edwards v. Harben.

2 Term Reports, 587-597 (1 R. R. 548).

Mortgage of Chattels. — Retention of Possession consistent with the Deed. — Statute 13 Eliz., c. 5.

[587] If a creditor take an absolute bill of sale of the goods of his debtor, but agree to leave them in his possession for a limited time, and in the mean time the debtor die, whereupon the creditor takes and sells the goods, he will be liable to be sued as executor *de son tort* for the debts of the deceased; for the

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debtor's continuing in possession is inconsistent with the deed and fraudulent against creditors. It is a general rule in the transfer of chattels that the possession must accompany and follow the deed. Therefore, where the conveyance is absolute, the possession must be delivered immediately; where it is conditional, it will not be rendered void by the vendor's continuing in possession till the condition be performed.

Assumpsit for goods sold to the defendant's testator. The defendant pleaded that he was not executor, nor had ever administered as such; and, secondly, that he had fully administered, &c. Replication, that he had administered divers goods, &c., of the testator; and issue thereon. And to the second plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and still has, goods and chattels of the deceased in his hands sufficient to satisfy the plaintiff's demands; and issue thereon. At the trial at the last assizes at East Grinstead, Sussex, a verdict was found for the plaintiff, with £22 18s. 6*d.* damages, and 40s. costs, subject to the opinion of this Court on the following case. William Tempest Mercer in his lifetime, and before the time of the execution of the bill of sale hereinafter mentioned, was indebted to the plaintiff in the sum of £22 18s. 6*d.* for goods sold and delivered, which sum still remains due to the plaintiff. William Tempest Mercer, at the time of the execution of the said bill of sale, was likewise indebted to the defendant in the sum of £191 for money lent. On the 27th of March, 1786, Tempest Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the * money should not be sooner paid; to which [*588] Tempest Mercer agreed, and accordingly on the same day executed a bill of sale in the common form, by which Mercer bargained and sold to the defendant for ever his household furniture, medicines, stock in trade [particularly specifying them], and all and every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes. Immediately upon the execution of the bill of sale, possession was delivered to the defendant in the manner described therein, viz. by the delivery of one corkscrew in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale

remained in the possession of William Tempest Mercer until the time of his death, which happened on the 7th of April, 1786. On the 8th of April, 1786, being before the expiration of fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for £236 7s. 5*d.* William Tempest Mercer died intestate; and no letters of administration were taken out to the deceased by the defendant, or by any other person, before the commencement of this action. The question for the opinion of the Court is, whether the defendant be entitled to retain the produce of the said effects, or at least the value of £191, the consideration of the bill of sale; or whether the bill of sale be void as against the creditors of William Tempest Mercer; and the plaintiff in this action be entitled to recover his debt of £22 18s. 6*d.* against the defendant, as executor *de son tort*?

Partington, for the plaintiff, contended that the bill of sale mentioned in the case was fraudulent against the creditors of the deceased, and was void under 13 Eliz., c. 5; and that consequently the defendant must be considered as an executor *de son tort*, in which case he could not retain for any debt of his own: Cro. Jac. 271; Yelv. 196. This bill of sale is void under the 13 Eliz., c. 5, because it was not attended with any mark of possession notorious to the rest of the world, but the vendor, by agreement with the vendee, which constituted a part of the original transaction, continued in the possession and disposition of the goods mentioned in the bill of sale until his death. In considering this question, the two following principles may be supported: 1st. Whenever the vendor is found in the actual possession of goods which he has sold, such continuance in possession is *prima* [* 589] **facie* evidence of an intent to delay, hinder, or defraud creditors, and throws it on the other party to rebut it, by showing that the continuance in possession was with some other view. 2ndly. Whenever there is a positive agreement between the parties that the vendor shall be permitted after the sale to have, for any space of time, not only the mere manual occupation, but also the disposition, of the goods sold, to trade with them as his own, it is an actual fraud on the other creditors of the vendor. As to the first; every man is supposed to intend the natural and probable consequences of his own acts, unless it can be shown from

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circumstances that he acted upon some other motives. This applies not only to civil, but also to criminal cases. For if a man do any act which in its consequences tends to destroy the life of another, and death ensues, he must be convicted of murder, unless he can show that he had no intention to commit that crime. So if a person speak or publish something in writing concerning another, which in its nature tends to defamation, he will be punished for publishing slander or a libel, unless he can show that he had no intention to defame, but acted on proper motives, such as that he had been the master of the prosecutor, and was giving his character as a servant. Now in a case like the present, the natural and probable consequences of suffering another to continue in the possession of property not his own, is to hinder, delay, and defraud creditors of their just debts, by giving him false credit, and inducing them by the appearance of property to delay taking the necessary means to recover their demands. Visible possession is the only criterion of personal property. It is not like the possession of lands, where a delivery of the deeds is the notorious transfer of possession; or like a ship at sea, where no actual possession can be taken; and where, for that reason, a delivery of the grand bill of sale is considered as a delivery of the ship (*Atkinson v. Maling*, 2 T. R. 462; 1 R. R. 524). And therefore the mere possession of a ship does not give the possessor a credit like the possession of other goods, because a purchaser or mortgagee of a ship inquires for the grand bill of sale. Now this being the natural consequence of the vendor's continuance in possession, it is conclusive in this case, because no contrary intention is shown. Secondly, The bill of sale delivered under the circumstances of this case is an actual fraud upon the vendor's creditors. For here the false credit is not only the natural and probable, but the unavoidable * consequence of [* 590] the deliberate act of the parties, — an act incapable of explanation from any other motive than that of imposing on creditors. It is a stipulation from which neither party can draw a fair advantage. Either the vendor must be considered in the intermediate time as a trustee for the vendee, or that he is empowered to trade with the vendee's property for his own benefit. If the former, he receives no personal benefit from the stipulation: if the latter, it necessarily implies that the sale was not real, or that the consideration was not adequate; otherwise the vendee would not risk his property and give up part of his purchase for nothing.

But if the parties be considered as acting with a view to impose upon the creditors of the vendor, the conduct of both is reconcilable: the vendor is desirous of holding out a false credit; the vendee is willing to assist him in the design, provided he can secure himself from the other creditors; and therefore they form this species of contrivance: "If you will put me in a situation to be safe against your other creditors, I will leave you in that which shall induce them not to attack you. You shall preserve the creditors from having possession; I will retain the security from the real ownership. Give me the command of the property; you shall have it to hold out to the world and your creditors as your own." This is a collusion between them to defraud the creditors of the vendor: it is an advantage stipulated for by the vendors, and allowed by the vendee at the expense, not of himself, but of the creditors. The consequences of giving effect to conveyances of this kind are dangerous in the extreme; it enables a debtor to withdraw his person or effects before his creditors can take the alarm, and may perhaps prevent their ever taking any effectual steps to recover their demands. Apparent personal property is the principal foundation of general credit. It is material, therefore, when a person is reduced to part with this kind of property, especially such as is considered either as objects of personal accommodation, or as instruments of trade, that his creditors should be aware of his situation. A contrivance to conceal it is an attempt to deceive them; therefore, such a transfer with an intent to preserve the same appearance to the world as before, accompanied with a stipulation answering that and no other purpose, is a conveyance with an intent to deceive, defraud, and delay creditors; because it is to leave a party in a state of apparent credit under circumstances

which, if known, would show him not to be entitled to
 [* 591] * it, and give creditors notice what steps they ought to take.

The leading case on this subject is *Twyne's Case*, 3 Co. Rep. 80; in which the vendor's continuing in possession seems to have been considered as the principal mark of fraud; and Lord Coke subjoins his opinion and advice to purchasers, "immediately after the gift, take the possession of them: for continuance of the possession in the donor is a sign of trust." This was directly confirmed by Lord Coke's opinion in *Stone v. Grubham*, 2 Bulst. 218; and by the reasoning of BURNET, J., in *Ryall v. Roll*, 1 Atk. 168, 1 Ves. 348. Therefore in this case the agreement, which was part

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of the original transaction, that the vendor should continue in possession for a certain time after the execution of the bill of sale, vacates it under the Statute 13 Eliz., c. 5. This cannot be considered to be only an indulgence to the vendor, because it was an express stipulation in the original agreement, which the law will not allow, it being at the expense of the other creditors. Neither can the conveyance be good as a mortgage with condition that the possession was not to be taken until forfeited; for the case of *Ryall v. Roll* decides that a mortgage of goods without possession cannot exist in point of law. If it did, no person who intended to secure himself would take it; for if the mortgagor were to have the possession till forfeited, he might dissipate the whole property and render the security ineffectual. His advantage is only in proportion to the danger of the security. His profit is to arise from the disposal of the old stocks, and the stock which replaces the fluctuation is no part of the mortgagee's security. This is not like the case of a mortgage of land, or fixed property, where the principal remains untouched, and produces an annual profit. But even if the vendor had delivered up the possession, still the bill of sale must be considered as fraudulent. The transaction on the face of the deed is an absolute sale, in which case, if the possession had been delivered, the vendor could not have taken the surplus; that would defraud the rest of the creditors; but the real agreement made it a security voidable on payment of £191 within fourteen days, and after that time the vendee had only a power to enter and sell the security, which consequently raised an implied trust as to the residue for the vendor. Thus the vendor reserved something out of the property in his own favour, which his creditors would not have known, and consequently it was a fraud on them. And this presumption is *strengthened by the [* 592] circumstance of there not having been any valuation or appraisement of the goods at the time, which shows that the transfer was not meant to be a real one. There is also another light in which this bill of sale must be considered to be void. It is a general conveyance by a trader, out of the regular course of trade, of an uncertain property, partly consisting of stock in trade, for the purpose of satisfying a particular creditor, and that to such an extent as would prevent his carrying on any future trade after actual possession was taken, and would consequently take away his only means of satisfying his other creditors. There is indeed

an inventory annexed to the bill of sale; but it is followed by a general sweeping clause of all property and stock in trade which shall be in the house. This defeats the particular enumeration; and to allow the circumstance of an inventory of part of the goods to take away the general rule would be to destroy the rule itself, because such an inventory might always be added. This makes the bill of sale void on the principle on which cases of bankruptcy have been determined. The cases on that subject have gone the length of determining that a conveyance made by a trader of his property, which, by its consequences, disables him from carrying on his business, whether made with a view to satisfy a present, or indemnify a future, creditor, or for what purpose soever, is *ipso facto* void against creditors, because it destroys all means of satisfying those creditors. *Hooper v. Smith*, 1 Bl. Rep. 442; *Law v. Skinner*, 2 Bl. Rep. 996; *Hussels v. Simpson*, Dougl. 86, *n.* 39. Now if such a conveyance be void as against creditors, it is on the ground of fraud; and therefore this bill of sale must on that principle also be determined to be fraudulent and void.

But even supposing the deed not to be void, still the defendant acted improperly in taking possession before the time stipulated between the parties. [The Court told the plaintiff's counsel he need not go into that point.]

Steele, for the defendant. — If the Court decide that this assignment was void, it will in effect determine that all bills of sale of property, where possession is not immediately delivered, are fraudulent and void under the Statute 13 Eliz., c. 5; because it is stated in the case that this was given for a debt really due. But no case has ever yet determined that the mere want of possession alone is sufficient to make the assignment fraudulent and [*593] * void; and that statute could never have been intended to extend to a case like the present, for there is a proviso in it to protect conveyances for good and *bonâ fide* considerations. The want of possession is indeed *primâ facie* evidence of fraud, and it is mentioned in *Turquē's Case*; but there it is only given as one among six reasons. In that case an action had actually been brought, and it plainly appeared that the assignment was given for the mere purpose of defeating a creditor who was pursuing his right of action, and who had recovered a judgment at the time when the bill of sale was executed. Almost all the other cases on this subject were determined on the bankrupt laws: the question

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in those cases is, whether the assignment amounted to an act of bankruptcy, which is extremely different from the question whether a deed be void as against creditors in other cases. Such an assignment as the present might perhaps be deemed fraudulent within the bankrupt laws, so as to enable the commissioners to sell the property, thus assigned, but remaining in the hands of the bankrupt, for the benefit of the creditors; but that power is expressly given by the 21 Jac. I., c. 19, s. 11. This shows that without such a clause the mere circumstance of the bankrupt's continuing in possession would not have avoided the conveyance, or enabled the commissioners to sell even in those cases; but that statute does not apply to the present case, nor avoid any *bonâ fide* conveyance, merely because no notice is given to creditors, but in the case of bankruptcy. With respect to the transaction; in this case it has been said that the bill of sale must be considered as void, because the vendor was to continue in possession fourteen days; but so far from there being any intention of fraud, it is expressly stated in the case that the defendant refused to accept the bill of sale, unless he should be permitted to take possession immediately after the expiration of the fourteen days in case the money were not paid. This stipulation therefore proceeding from the vendee removes every suspicion of fraud, and accounts for the want of immediate possession. But even if the Court should be of opinion that this deed was fraudulent, as against creditors, in the lifetime of the grantor, yet this action cannot be maintained against the defendant as executor *de son tort*, because it is impossible to say on this case that the defendant intermeddled with the intestate's goods. At any rate the bill of sale was good as between the vendor and the vendee; the property of the goods passed immediately to the vendee, the bill of sale being delivered to the vendee himself; *and though it was agreed that [* 594] he should not take possession for fourteen days, yet that condition cannot affect the immediate property which passed by the deed itself. Co. Lit. 36 a. Then if the property passed by the delivery of the bill of sale, the vendee cannot be considered to have intermeddled with the intestate's goods by taking possession of his own property. Even supposing that the property in the goods did not pass to the defendant by the bill of sale, still no action can be maintained against him as executor *de son tort*, because he claimed a right to the goods, though trespass might be brought against him by the rightful executor.

Partington in reply was stopped by the Court.

BULLER, J. — This is an action brought by the plaintiff, who is a creditor of Mercer, against the defendant as executor. It does not appear by the case that any other goods than those mentioned in the bill of sale came to the defendant's hands. The bill of sale is dated on the 27th March, 1786, and is a general bill of sale of all the defendant's household furniture and stock in trade. This bill of sale is to take effect immediately on the face of it; but there was an agreement between Mercer and the defendant, that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken till after the death of Mercer, which happened within the fourteen days; but there was a formal delivery of a corkscrew in the name of the whole. On this case two questions arise: first, whether this bill of sale be void or not; and, secondly, if void, whether the defendant, by having taken these goods under the bill of sale, made himself liable as an executor *de son tort*. The first question came

before the Court in the last term in the case of *Bamford* [* 595] v. *Baron*, 2 T. R. 594 *n.*; on a motion * for a new trial from the Northern circuit; and after hearing that case argued, we thought it right to take the opinion of all the Judges upon it. Accordingly we consulted with all the Judges, who are unanimously of opinion that unless possession accompanies and follows the deed, it is fraudulent and void; I lay stress upon the words "accompanies and follows," because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on this subject, from which it appears to me that the principle which I have stated never admitted of any serious doubt. So long ago as in the case in *Bulstrode*, the Court held that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance * be conditional, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately and those which are to take place at some future time. For in the latter case the possession

continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as accompanying and following the deed. That case has been universally followed by all the cases since. One of the strongest is quoted in *Bucknall and Others v. Roiston*, Pr. in Chan. 287; there one Brewer having shipped a cargo of goods, borrowed of the plaintiff £600 on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff. There Sir E. Northey cited a case, "where a man took out execution against another; by agreement between them the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution; and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property." And he said it had been ruled forty times in his experience at Guildhall, that, if a man sells goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The LORD CHANCELLOR held in the principal case that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in * point of law: that is the [* 597] point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent. On the other hand, there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of *Lord Cadogan v. Kennet*, Cowp. 432; because there the

possession followed the deed. So also the case of *Haslington and Another v. Gill and Another*, sheriff of Middlesex, 3 T. R. 620 *n*; there personal property, consisting (*inter alia*) of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the Court held that only those which were purchased after the marriage could be taken to satisfy the debts of the husband. The second question then is, Whether the defendant's having taken possession of these goods after Mercer's death, though under the bill of sale, will make him an executor *de son tort*? The two cases, which were cited by the plaintiff's counsel, are decisive of this point. In *Bac. Abr.*, 2 *Bac. Abr.* 605, it is said, "If a man make a deed of gift of his goods in his lifetime by covin to oust his creditors of their debts, yet after his death the vendee shall be charged for them." There too the possession was delivered to the vendee. To support this doctrine 13 H. IV., 4 b, *Roll. Abr.* 549, are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in *Cro. Jac.* and *Yelv.* cited at the bar prove it, and state the manner in which he shall be charged. There is also another strong case on this point in *Dyer*, Dy. 166 b. In short, every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort*.

GROSE, J., observed that it was unnecessary to repeat what had been said from the Bench; but said that he was perfectly satisfied that the law was as had been stated. *Postea to the plaintiff.*

ENGLISH NOTES.

The question how far the retention of possession of chattels by the assignor thereof raises an inference of intent to defraud creditors within the Statute 13 Eliz., c. 5, came before the Star Chamber in *Twyne's Case* (1601), 3 Co. Rep. 80, 5 R. C. 2, where it was held that such retention of possession is *prima facie* proof of fraudulent intent. It is, however, now well settled that though, in the case of an assignment of chattels by way of absolute sale, the retention of possession is indicative of fraud, yet where the assignment is by way of mortgage, where the retention of possession of the mortgagor till default is usually contemplated, such retention is only indicative of fraud if inconsistent with the mortgage deed. So Mr. Justice BULLER says (*Buller N. P.* 268), "the donor's continuing in possession is not in all cases a mark of fraud, as where a donee lends his donor money to buy goods, and at the same time takes

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a bill of sale of them for securing the money." See *Martindale v. Booth* (1832), 3 B. & Ad. 498, 37 R. R. 485.

The effects of the common law doctrine, as well as the successive attempts of the English Legislature to modify it to the advantage of the general creditors have been fully considered under the title "Bill of Sale" in vol. 5 *supra*.

AMERICAN NOTES.

On this question there is some conflict in this country. The more general American doctrine is in harmony with the English, that retention of possession is only *primâ facie* a circumstance to be considered as indicative of fraud as to creditors. The subject is discussed in Jones on Chattel Mortgages, Ch. 8, citing the principal case, and many others. In some States the matter is regulated by statute. The English rule is enforced in *Crawford v. Kirksey*, 50 Alabama, 590; *George v. Norris*, 23 Arkansas, 121; *Goodwyn v. Goodwyn*, 29 Georgia, 225; *Kane v. Drake*, 27 Indiana, 29; *Denny v. Faulkner*, 22 Kansas, 89; *Keller v. Blanchard*, 19 Louisiana Annual, 53; *Fairfield Bridge Co. v. Nye*, 60 Maine, 372; *Hudson v. Warner*, 2 Harris & Gill (Maryland), 415; *Ingalls v. Herrick*, 108 Massachusetts, 351; *Hatch v. Fowler*, 28 Michigan, 205; *Blackman v. Wheaton*, 13 Minnesota, 326; *Ketchum v. Brennan*, 53 Mississippi, 596; *Robison v. Uhl*, 6 Nebraska, 328; *Coburn v. Pickering*, 3 New Hampshire, 415; *Parr v. Brady*, 37 New Jersey Law, 201; *Hanford v. Archer*, 4 Hill, 271; *May v. Walter*, 56 New York, 8; *Rea v. Alexander*, 5 Iredell Law (Nor. Car.), 644; *Barr v. Hatch*, 3 Ohio, 527; *Sarle v. Arnold*, 7 Rhode Island, 582; *Carney v. Carney*, 7 Baxter (Tennessee), 284; *Thornton v. Tandy*, 39 Texas, 544; *Davis v. Turner*, 4 Grattan (Virginia), 422; *Grant v. Lewis*, 14 Wisconsin, 487; *Bryant v. Carson R. L. Co.*, 3 Nevada, 313; 93 Am. Dec. 403; *Lucketts v. Townsend*, 3 Texas, 119; 49 Am. Dec. 723; *Chaffee v. Atlas Lumber Co.*, 43 Nebraska, 224; 47 Am. St. Rep., 753; *Conard v. Atlantic Ins. Co.*, 1 Peters (U. S. Sup. Ct.), 386; *Kleine v. Katzenberger*, 20 Ohio St., 110; 5 Am. Rep. 630.

The retention of possession was regarded as fraudulent *per se*, irrespective of intention, in *Woods v. Bugbey*, 29 California, 466 (by statute); *Haustal v. Blakeslee*, 41 Connecticut, 301; *Taylor v. Richardson*, 4 Houston (Delaware), 300 (by statute); *Smith v. Hines*, 10 Florida, 258; *Rozier v. Williams*, 92 Illinois, 187; *Prather v. Parker*, 24 Iowa, 26 (statute requiring record); *Morton v. Ragan*, 5 Bush (Kentucky), 334; *Burgert v. Borchert*, 59 Missouri, 80 (statute); *McCully v. Swackhamer*, 6 Oregon, 438; *Garman v. Cooper*, 72 Penn. St. 32; *Houston v. Howard*, 39 Vermont, 51; *Golden v. Cockril*, 1 Kansas, 259; 81 Am. Dec. 510 (unless recorded); *Frankhouser v. Ellett*, 22 Kansas, 127; 31 Am. Rep. 171.

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(C. A. 1879.)

RULE.

EVERY conveyance or charge made for the intent or purpose to defraud or deceive purchasers, or made by the secret intent of the parties so as to retain the property to their own use and disposition under colourable pretence that such conveyance or charge is made *bonâ fide*, is void under the Statute, 27 Eliz. c. 4.

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11 Ch. D. 1-23 (s. c. 48 L. J. Ch. 168; 40 L. T. 640; 27 W. R. 851).

[1] *Fraudulent Deed.* — 27 Eliz., c. 4. — *Mortgage executed without Agreement and without Knowledge of Mortgagee.* — *Recital.* — *Estoppel.*

A mortgage executed in 1871 contained a recital that the mortgagor was indebted to the mortgagee in the sum of £1,500 for moneys advanced by her to him, and that he had agreed to secure the payment of the same by the mortgage. The money had been advanced in 1864, and the evidence showed that there was at that time no agreement for a mortgage, and that there had been no subsequent pressure by the lender. The mortgage deed was retained in the possession of the mortgagor, and there was nothing to show that the mortgagee knew of its execution until February, 1874:—

Held, by FRY, J., and by the Court of Appeal, that the mortgage was void under 27 Eliz., c. 4. as against a mortgagee for value whose mortgage was [* 2] *executed in February, 1872, the recital of the agreement not operating as an estoppel against him.

This was a foreclosure action by mortgagees. The plaintiffs also claimed a declaration that a mortgage of prior date to theirs was fraudulent and void as against them, or otherwise that in the events which had happened it had become postponed to their mortgage.

On the 1st of January, 1867, Joseph Turnley, who was the owner in fee of a property at Norwood, called the Selhurst Park estate, containing about thirty-two acres, executed a mortgage of it [* 3] to the *trustees of the Guardian Life Assurance Company, to secure the payment of £35,000 and interest.

On the 24th of June, 1870, Joseph Turnley executed a second mortgage of the Selhurst Park estate to John James and W. M.

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Tuffnell, trustees for the Reliance Life Assurance Society, to secure the payment of £6827 10s. and interest.

On the 15th of August, 1871, Joseph Turnley executed a third mortgage of the Selhurst Park estate to his step-daughter Diana Pellowe (who was a daughter of his second wife, formerly Mrs. Pellowe, by her first husband), to secure the payment of £1500 and interest. This mortgage contained a recital that Turnley was indebted to Diana Pellowe in the sum of £1500, for moneys advanced by her to him, and that he had agreed to secure the payment of the £1500, with interest from the date of the advance, by a mortgage of the Selhurst Park estate. The plaintiffs alleged that this mortgage was fraudulent and void as against them, under circumstances which will be stated presently.

On the 16th of August, 1871, Joseph Turnley executed a fourth mortgage of the Selhurst Park estate to Harriet Pellowe (another step-daughter), to secure the payment of £3500 and interest.

On the 22nd of February, 1872, Joseph Turnley executed a fifth mortgage of the Selhurst Park estate to the plaintiffs, to secure the payment of £5500 and interest. This mortgage comprised also a plot of land near the Norwood Junction Station, of which Joseph Turnley was then seised in fee free from incumbrances. Harriet Pellowe joined in this mortgage for the purpose of postponing her charge of £3500 on the Selhurst Park estate to the charge created in favour of the plaintiffs. The mortgage contained a power of sale. The plaintiffs were the trustees of the settlement executed on the marriage of Joseph Turnley's daughter, Mrs. Luscombe, and they had then recently recovered judgment against him in an action in the Court of Exchequer upon a covenant by him in the marriage settlement. The sum of £5500 was the amount which remained due to them under the judgment. When the plaintiffs took their mortgage they had no notice of the mortgage of the 15th of August, 1871, to Diana Pellowe, though they had notice of the mortgages to the Guardian Company and the Reliance Company.

On the 21st of March, 1872, Joseph Turnley executed a memorandum * in writing, charging the Selhurst Park estate [* 4] with the payment of £376 13s. 2d., and interest thereon, to R. C. Driver.

On the 3rd of May, 1872, Joseph Turnley executed an agreement in writing charging the Selhurst Park estate with the payment of £250 and interest to Messrs. Janson, Cobb, and Pearson, and

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on the 9th of August, 1872, Harriet Pellowe executed a deed postponing her charge of £3500 to the charge in favour of Janson Cobb, and Pearson.

On the 12th of August, 1872, Joseph Turnley executed another mortgage of the Selhurst Park estate to Joseph Oliver, to secure the payment of £4500 and interest.

On the 24th of April, 1873, the trustees of the Guardian Company transferred their mortgage and assigned the moneys then remaining due thereon to Tuffnell, who was the then surviving trustee for the Reliance Company.

By their statement of claim the plaintiffs alleged that at the date of the mortgage of the 15th of August, 1871, Joseph Turnley was not indebted to Diana Pellowe in the sum of £1500, or in any other sum, nor was any money then or ever advanced by her to him on the security of the mortgaged property, and that the deed was executed by Turnley solely with a view to its being used by him at some future time for the purpose of defeating and delaying his creditors.

In the opinion of the Court, however, the evidence at the trial proved that the circumstances under which the mortgage was executed were as follows: On the 1st of April, 1864, a Mr. William Johnson, who was an intimate friend of Joseph Turnley and his family, and a man of large fortune, made Diana Pellowe a present of £1500. This sum was soon afterwards invested in the purchase of a sum of consols in the joint names of Diana Pellowe and a Mr. Parker, who was a cousin of hers. In May, 1864, the consols were sold, and the proceeds of the sale, which amounted to nearly £1500, were lent by Diana Pellowe to Joseph Turnley. But there was no agreement at the time of the advance that he should give her security for the repayment of the money, and she never subsequently pressed him to do so. When he had executed the mortgage he handed it to his wife, the mother of Diana Pellowe, and she retained it in her possession. Its execution was not [15] communicated * to Diana Pellowe, and, so far as appeared from the evidence, she did not know of the existence of the mortgage before the 28th of February, 1874.

On the 12th of February, 1874, Joseph Turnley filed a liquidation petition. In the statement of his affairs presented to the first meeting of his creditors under this petition he inserted the name of Harriet Pellowe in the list of his secured creditors, stating

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that she held a fourth mortgage upon the Selhurst Park estate, but he inserted the name of Diana Pellowe in the list of unsecured creditors. On the 28th of February, 1874, however, a proof was carried in on behalf of Diana Pellowe for £1687 10s., which she alleged to be due to her, and her affidavit stated that she held as security a mortgage, subject to other mortgages, on the Selhurst Park estate, which security she was willing to give up to the trustee to be appointed under the proceedings. The proceedings under this petition became abortive, inasmuch as a resolution that the debtor's affairs should be liquidated by arrangement, which was proposed at the first meeting of the creditors on the 2nd of March, 1874, was not carried by the proper majority. On the 5th of March, 1874, Joseph Turnley filed a second liquidation petition, and under this petition his creditors duly resolved upon a liquidation by arrangement, and appointed J. F. Lovering trustee. Under this petition also Harriet Pellowe was entered in the list of secured creditors, and Diana Pellowe in the list of unsecured creditors. Harriet Pellowe carried in a proof for £3380, the sum which she alleged to be due to her upon her security, and she valued her security at £100, and claimed to prove on the debtor's estate for £3280. Diana Pellowe carried in a proof for £2243, the sum which she alleged to be then due to her for principal and interest, and her affidavit stated that she held as security a mortgage, subject to other mortgages, on the Selhurst Park estate, which security she was willing to give up to the trustee.

The plaintiffs did not prove under either of the liquidation proceedings. They alleged that they never heard of the mortgage of the 15th of August, 1871, to Diana Pellowe until the spring of the year 1876, when they were about to commence this action.

In June, 1876, the plaintiffs, in exercise of their power of sale, sold the Selhurst Park estate for £40,000, and on the 31st of October, 1876, the property was conveyed to the purchasers [* 6] by a deed to which Tuffnell, the plaintiffs, and the purchasers were parties. At the time when this deed was executed there was due to the Reliance Company (for whom Tuffnell was trustee) upon the security of the Selhurst Park estate, the sum of £35,817 13s. 4d. There was also due to the same company the sum of £273 4s. 5d., upon the security of an equitable deposit of a policy of assurance on the life of Joseph Turnley, and two mortgage deeds, dated respectively the 20th of September, 1866, and the

22nd of September, 1866, which three documents Turnley had in March, 1870, deposited with Tuffnell and James as trustees for the Reliance Company. Tuffnell claimed the right to consolidate the mortgage on the Selhurst Park estate with the equitable deposit of March, 1870, and declined to execute the conveyance of the 31st of October, 1876, unless the £273 4s. 5d., as well as the £35,817 13s. 4d., was paid to him out of the purchase-money. This was accordingly done, the whole sum paid to Tuffnell on behalf of the Reliance Company thus amounting to £36,090 17s. 9d. The documents comprised in the equitable deposit of March, 1870, were then delivered by Tuffnell to the plaintiffs. Out of the residue of the purchase-money the sum of £2250 was invested in joint names to await the determination of the validity as against the plaintiffs of the mortgage to Diana Pellowe, and the remainder of the purchase-money was paid to the plaintiffs. Lovering, as trustee of Turnley, claimed to be entitled, by virtue of Diana Pellowe's abandonment of her mortgage in his favour, to stand in her place in respect of the mortgage, which he asserted to be a valid mortgage, and entitled to priority over that of the plaintiffs. The plaintiffs alleged and contended (*inter alia*) that that mortgage was fraudulent and void as against them under the statute 27 Eliz. c. 4.

[7] The defendants to the action were Messrs. Janson, Cobb, and Pearson; Harriet Pellowe; R. C. Driver; Joseph Oliver; and Lovering.

Lovering delivered a statement of defence and counter-claim by which he insisted on the validity of Diana Pellowe's mortgage, and asked for an account of what was due in respect of that mortgage, and for foreclosure of the plaintiffs and the other defendants in default of payment.

The evidence was taken by affidavit.

The action came on for trial before Mr. Justice Fry on the 26th of June, 1878.

Cookson, Q. C., and Creed, for the plaintiffs :—

The mortgage to Diana Pellowe is void as against us [* 8] under the *statute 27 Eliz., c. 4. It may even be said that it was never delivered as a deed: *Watkins v. Nash*, L. R., 20 Eq. 262. But, if it was, there is no proof of any agreement by Turnley when the money was lent to him to give security for it, or of any subsequent pressure on the part of Diana Pellowe for payment or security. Forbearance to enforce payment of an existing debt

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has been held in some cases to be consideration for an agreement to give security: *Oldershaw v. King*, 2 H. & N. 517; *Alliance Bank v. Broom*, 2 Dr. & Sm. 289; but that is when the lender is pressing for payment. The recital of the agreement contained in the mortgage is no estoppel as against us. There is nothing to show that Diana Pellowe knew of the execution of the mortgage before the 28th of February, 1874, when she proved in the first liquidation, and that was long after the date of our mortgage. *Wallwyn v. Coutts*, 3 Mer. 707 (17 R. R. 173); *Garrard v. Lord Lauderdale*, 2 Russ. & My. 451.

[FRY, J.:—The question is, whether the mortgage to Diana Pellowe was a voluntary deed; whether, in the absence of any proof of agreement or pressure, it is void as against you?]

The statute makes it void under such circumstances.

North, Q. C., and Rigby, for Lovering:—

The mortgage to Diana Pellowe must be shown to have been voluntary, *Doe v. Manning*, 9 East, 59 (9 R. R. 503), otherwise it is not made void by the statute. Non-communication of the deed to the mortgagee could not affect its validity. *Fletcher v. Fletcher*, 4 Hare, 67; *In re Hay's *Trusts*, 2 D. J. & S. 365. In [*9] *Eston v. Scott*, 6 Sim. 31, a mortgage executed by the mortgagor voluntarily and without any communication to the mortgagee, and retained in the possession of the mortgagor until his death, was held to be good as against his creditors.

The recital in the deed of the agreement to give the mortgage operates as an estoppel against the plaintiffs, who claim through the same mortgagor.

Cookson, in reply:—

Eston v. Scott was a case under the statute 13 Eliz., c. 5, and it was not shown that the mortgagor was insolvent when he executed the mortgage. The recital of an agreement to give a mortgage cannot estop us, because we claim under a better title through the statute. The law as to voluntary deeds is shewn by *Spiritt v. Willows*, 3 D. J. & S. 293; *Freeman v. Pope*, L. R., 5 Ch. 538.

*FRY, J., after stating the facts, continued:— [*10]

It appears to me upon the evidence to be reasonably clear that the money was in the first place lent by Diana Pellowe to Mr. Turnley without any agreement for security, and further, that there was no demand afterwards made by her for payment or security. It appears equally clear that Mr. Turnley executed and

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delivered the mortgage to her with all the necessary formalities, that it was delivered as a deed and not as an escrow, and further, that Diana Pellowe had no knowledge for two years afterwards of the execution of the deed, or of her having any other rights than those which resulted from the mere fact of the loan.

If there had been pressure by her for the security, or agreement, in fact, to give it, that would, in my opinion, have been a good consideration for it, because I think the authorities have established that in both those cases the law imports an agreement on the part of the lender to forbear for a certain undefined period of time. But in the present case I find neither pressure nor agreement in fact. If before the 22nd of February, 1872, the date of the plaintiffs' mortgage, Diana Pellowe had known of and had adopted the deed of the 15th of August, 1871, I should probably have held that an agreement had been in fact constituted between her and Mr. Turnley in respect of the execution of the security. But, inasmuch as it appears that she never knew of, and could not therefore have adopted or ratified or acquiesced in, the deed of the 15th of August, 1871, until two years or more after the execution of the plaintiffs' mortgage, it appears to me impossible to say that that subsequent ratification by her could constitute a valid consideration two years previously. For I must try the question as on the date when the plaintiffs' title was derived from Mr. Turnley. It has been, however, urged that the effect of the deed of the 15th of August, 1871, containing, as it does, a recital of an agreement to give a mortgage, is to estop Mr. Turnley and the plaintiffs who claim through him from denying that there was such an agreement. As regards Mr. Turnley and all those who claim simply under him, I will not for a moment say that such an estoppel might not work. But the plaintiffs' title is derived

under the statute 27 Eliz., c. 4, and the questions arising [*11] under that statute must, as it appears to me, be tried *independently of any estoppel between the defrauding vendor and the person who claims through him. The statute itself gives to a purchaser for valuable consideration from the person who has executed a voluntary conveyance a title higher and better than that which he himself possessed. The doctrine of estoppel, which might prevail as between the voluntary grantor and the person who derives title under the voluntary conveyance, cannot bind those who claim from the former by a subsequent purchase for value, and consequently derive title under the statute itself.

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I come, therefore, to the conclusion that the mortgage of the 15th of August, 1871, must be declared fraudulent and void as against the plaintiffs.

There is one other observation which I ought to make before parting with this part of the case, viz., that *Eerton v. Scott*, 6 Sim. 31, appears to me not to be an authority governing the present case, for the reason pointed out by Mr. Cookson. There the grantor was not insolvent when he executed the deed, and he remained in a state of solvency for twelve years afterwards. The VICE-CHANCELLOR, therefore, held that the statute 13 Eliz., c. 5, did not apply. . . .

NORTH. — Your Lordship will direct the plaintiffs to deliver [13] up to the trustee the documents comprised in the equitable mortgage of March, 1870.

FRY, J. — I do not see how I can do that. You do not ask for it by your counter-claim.

NORTH. — The plaintiffs claim a charge upon the documents. [14] The court is dealing with the priorities, and all the parties are entitled to have their rights declared.

FRY, J. — I think I can make it a condition. I declare that the plaintiffs are not entitled to any right in respect of the equitable mortgage of March, 1870, and I direct that the documents comprised in it are to be delivered up to the trustee.

The plaintiffs gave notice of appeal.

Lovering, upon being served with this notice, gave notice [15] that he intended on the hearing of the appeal to contend that the decision of the Court below should be varied by discharging that part of Mr. Justice FRY's order which declared that the plaintiffs were purchasers within 27 Eliz. c. 4, and that the mortgage of the 15th of April, 1871, was void against them, and that in lieu thereof it might be declared that Lovering was entitled in respect of that security to rank as an incumbrancer on the property in priority to the plaintiffs and the other defendants.

The appeal came on for hearing on the 3rd of March, 1879.

After arguments and disposing of other points in the appeals, the MASTER OF THE ROLLS considered the question arising on the cross appeal as follows :—

The appellant says that the mortgage security given by [21] Mr. Turnley in favour of his step-daughter Diana Pellowe is a valid mortgage security. The learned Judge has decided that it

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was avoided by the provisions of the statute of the 27 Eliz., c. 4, and the question which is raised for our consideration is whether he was right in so doing.

The facts are tolerably plain. The plaintiffs had brought an action for a very large sum of money in January, 1871, against Mr. Joseph Turnley, a sum of money which he was unable to pay. They had asked for security, and had not obtained it. According to the decision on the main issue Mr. Turnley had, in May, 1864, received a loan of money from his step-daughter, for which he had given no security, and as to which there is no evidence that he had paid any interest, or (with the exception of a paper given to his wife, the effect of which it is not very easy to state) had given any acknowledgment for it. After a lapse of more than six years, and on the 13th of August, 1871, whilst this action against him is pending, Mr. Turnley makes a secret deed of mortgage. He draws it up himself, does not communicate it to his step-daughter Diana; it recites an agreement for a mortgage for £1500, and, subject to prior mortgages, conveys the Selhurst Park estate to the step-daughter by way of mortgage for securing the repayment of £1500 and interest. That deed he kept in his own possession, subject to this, that he says he gave it to his wife to take care of, and the wife did not communicate it to the step-daughter, nor was any communication made to her whatever. Legally it remained in the possession and custody of Mr. Joseph Turnley.

The action having gone on to judgment, Mr. Turnley gives a security to the present plaintiffs, who were the plaintiffs in [* 22] the * action, on this very estate, by way of second mortgage, for the balance of the sum due to them on their judgment, and in doing so he suppresses and conceals from them the existence of this mortgage to Diana, and covenants against incumbrances, except the incumbrances therein mentioned, which were the incumbrances prior to the date of the mortgage in question. The plaintiffs, being purchasers for value, assert that this is exactly within the terms of the statute 27 Eliz., c. 4. Let us see what the statute says. After stating that great loss is incurred "by reason of fraudulent and covinous conveyances, estates, gifts, grants, charges, and limitations of uses," and so on, "which said gifts, grants, charges, estates, uses, and conveyances were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous of purpose and intent to deceive

such as shall have purchased or shall purchase the same, or else by the secret intent of the parties the same to be to their own proper use and at their free disposition, coloured nevertheless by a feigned countenance and show of words and sentences as though the same were made *bonâ fide* for good causes and upon just and lawful consideration." Now, I have no doubt whatever that the action of Mr. Turnley in this case was exactly that described in the second part of the preamble. Though he made this mortgage to be used, if he thought it convenient, in favour of the step-daughter, it was his secret intent that the same should be at his free disposition, so that, if he did not wish to bring it forward, he could keep it secret and get an advance of money or forbearance by conveying the estate, either by way of mortgage or sale, to other parties. The whole of his acts point to this most conclusively, and I think they could not be explained on any other theory. The only other possible suggestion would be that he intended to make it so as to defraud the plaintiffs; that is, he intended to defraud the plaintiffs by allowing them to purchase an incumbered estate, and that would bring him within the first part of the recital, and would make it equally void. It appears to me that this is exactly the case contemplated by the statute, and that the learned Judge in the Court below was quite right in so deciding, and that we ought to affirm his decision.

JAMES, L. J. : — [23]

I am of the same opinion; and I may add that I never saw a case more clearly within the words of the statute.

BRAMWELL, L. J. : —

I am also of the same opinion.

ENGLISH NOTES.

The statute 27 Eliz., c. 4 (which was made perpetual by the statute 39 Eliz., c. 18, s. 31), after stating in the preamble that great loss had been incurred by reason of fraudulent and covinous conveyances, gifts, &c., made or to be made out of lands, tenements, and hereditaments, purchased or to be purchased, which said gifts, &c. "were or hereafter shall be meant and intended by the parties that so make the same to be fraudulent and covinous of purpose, and intent to deceive such as shall have purchased or shall purchase the same, or else by the secret intent of the parties, the same to be to their own proper use and at their free disposition, coloured nevertheless by a feigned countenance and show of words and sentences, as though the same were made *bonâ fide* for good

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causes and upon just and lawful consideration," enacts in effect, by section 1, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses of, in or out of, any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as shall afterwards purchase in fee simple, fee tail for life, lives, or years, the same lands, tenements, and hereditaments, or any part thereof, or any rent, profit or commodity, in or out of the same or any part thereof are declared void, as against purchasers for money or good consideration, and persons claiming under them.

Saving, however (by sect. 3), all estates in and assurances of lands made for good consideration and *bonâ fide*.

By section 4, every conveyance or assurance of lands, with a clause of revocation, is declared to be void as against a subsequent assurance of the same hereditaments or any part thereof made without exercise of the power of revocation, for money or other good consideration. Provided that no lawful mortgage, made *bonâ fide* without fraud upon good consideration, shall be impeached by force of this Act.

Copyholds and other estates and interests in land are within the statute 27 Eliz., c. 4, *Doe d. Tunstall v. Bottrill* (1833), 5 B. & Ad. 131; *Currie v. Nind* (1835), 1 My. & Cr. 17; *Doe d. Baverstock v. Rolfe* (1838), 8 Ad. & El. 650.

It has been repeatedly held that the effect of this statute is to render voluntary conveyances not made for valuable consideration fraudulent within the meaning of the statute and void accordingly, though made without any intent to defraud: *Gooch's Case* (1590), 5 Co. Rep. 60; *Burrell's Case* (1608), 6 Co. Rep. 72; *Doe d. Otley v. Manning* (1807), 9 East 59, 9 R. R. 503; *Trowell v. Shenton* (C. A. 1878), 8 Ch. D. 318, 47 L. J. Ch. 738, 38 L. T. 369, 26 W. R. 837; see *Buckle v. Mitchell* (1812), 18 Ves. 100, 11 R. R. 155.

Questions as to want of good consideration can seldom arise in the case of mortgages, except where the security is given for a past debt. *Lloyd v. Attwood* (1858), 3 DeG. & J. 614.

By the Voluntary Conveyances Act, 1893 (56 & 57 Vict., c. 21) it is in effect (by s. 2) enacted that mere want of valuable consideration shall not render a conveyance fraudulent or covinous within the statute 27 Eliz. if the conveyance has been made *bonâ fide* and without fraudulent intent. By s. 3, an exception is made in the case where a purchaser for value, subsequent to the voluntary conveyance, has been made before the passing of the Act (29 June, 1893).

Good or valuable consideration alone is not sufficient to support a mortgage under the statute 27 Eliz., c. 4, as against a subsequent purchaser; the mortgage must also be *bonâ fide* without fraud. Thus a

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secret mortgage retained by the mortgagor though executed for good consideration, as to secure a subsisting debt, is fraudulent within the statute against a *bonâ fide* mortgagee: *Cracknall v. Janson*, *supra*. So also a mortgage to a relative, the title deeds being left with the mortgagor to enable him to raise money on them, is fraudulent; and the assignee for value from the mortgagee, if he allows the deeds to remain with the original mortgagor, is also postponed. *Perry-Herrick v. Attwood* (1857), 2 DeG. & J. 21, 27 L. J. Ch. 121; *Lloyd v. Attwood*, *supra*.

The Voluntary Conveyances Act, 1893, does not affect the statute 27 Eliz., c. 4, in avoiding conveyances which are fraudulent or covinous irrespectively of the question of want of consideration.

AMERICAN NOTES.

The substance of the Rule is found in statutory enactments in probably all the United States, following more or less closely the Statute of Elizabeth. See *Price v. Masterson*, 35 Alabama, 483; *Preusser v. Henshaw*, 49 Iowa, 41; *McMaster v. Campbell*, 41 Michigan, 513; *Thorpe v. Thorpe*, 12 South Carolina, 154; *Beeler v. Bullitt*, 3 A. K. Marshall (Kentucky), 280; 13 Am. Dec. 161; *Sabin v. Columbia Fuel Co.*, 25 Oregon, 15; 42 Am. St. Rep. 756.

To have this effect the mortgagee must have knowledge of the fraudulent intent. *Hall v. Haydon*, 41 Alabama, 242; *Farrand v. Caton*, 69 Michigan, 235.

The existence of a perfect consideration makes no difference if the mortgagee knows the fraudulent intent and has a purpose to aid it. *Moore v. Williamson*, 44 New Jersey Equity, 496.

Fraudulent intent on the part of the mortgagee is not shown by the fact that the mortgagor is embarrassed and a relation of the mortgagee: *Crawford v. Kirksey*, 55 Alabama, 282; 28 Am. Rep. 704; *Bamfield v. Whipple*, 14 Allen (Mass.), 13; *Thorpe v. Thorpe*, 12 South Carolina, 154; *Doswell v. Adler*, 28 Arkansas, 82; or that he immediately afterward made a general assignment for creditors: *Lyon v. McIlvaine*, 24 Iowa, 9; or at common law where it was given to secure and prefer a just debt: *Giddings v. Sears*, 115 Massachusetts, 505; *Southern White L. Co. v. Haas*, 73 Iowa, 399; *Estes v. Gunter*, 122 United States, 450; *Benson v. Maxwell*, 105 Penn. St. 274; *Magovern v. Richard*, 27 South Carolina, 272; *Bunnister v. Phelps*, 81 Wisconsin, 256. But if a purpose to put the property out of the reach of other creditors entered in, the mortgage is void: *Crowninshield v. Kittridge*, 7 Metcalf (Mass.), 520; *Robinson v. Stewart*, 10 New York, 189; *Schmidt v. Opie*, 33 New Jersey Equity, 138; *Cannon v. Young*, 89 North Carolina, 264.

 No. 12. — Hill v. Spencer, Ambler, 641, 642. — Rule.

No 12. — HILL v. SPENCER.

(CH. 1767.)

RULE.

SECURITIES given for an immoral consideration, as for a continuance of illicit intercourse, are void, but the Court will not relieve against a security given in consideration of past cohabitation.

Hill v. Spencer.

Ambler, 641-643.

Consideration. — Past illicit Cohabitation. — Voluntary Bond.

[641] Voluntary bond given by a person to a common woman, after he had kept her two years, not relieved against, upon a bill by the executor of the obligor.

Thomas Hill, who kept an oil-shop in London, and when about twenty-seven years old became acquainted with the defendant Spencer, who was a common prostitute, and was proved to have been so for seven years before. He provided a lodging for her, and continued criminal familiarity with her for two years, to his death, during which time he paid for her lodgings, which were at three different places, and allowed her two guineas a week. Her name was Chamber, but upon her going to be kept by Hill, she changed her name to Spencer; and Hill passed by the same name, and gave out to the person where she lodged, that he was her husband. It appeared in evidence, That after she went [642] to be kept by Hill, she lay with one Perry, who was an acquaintance of Hill's. That some time before his death, Hill offered to give her £1000, which she refused, saying it would hurt him to draw it out of trade; and that Hill thereupon resolved to make a provision for her, and gave a bond, conditioned to pay her £50 a year for her life, and paid her down the first quarter's interest immediately. That, talking of his brother upon the occasion, he said, he was sure his brother would not after his death dispute any provision he should make for the defendant. Upon the death of Hill, which happened soon afterwards, his brother paid two quarters of the annuity, and then refusing to pay any more, filed this

No. 12. — *Hill v. Spencer, Ambler, 642, 643.*

bill, for an injunction to prevent the defendant proceeding at law, and to have the bond delivered up.

It was argued for the plaintiff, That the Court distinguishes between a bond given in case of a seduction, which is considered as *præmium pudoris*, and a bond given to a common prostitute. That the Court does not in the latter case require evidence of actual fraud, but proceeds upon principles of public utility, and presumes that common prostitutes are full of arts and designs; and such presumption is made from general principles of policy, to discourage the offence. That the Court will set aside marriage brocage bonds, &c. upon the same reasoning. That there is evidence of her unfaithfulness to Hill, by being familiar with Perry. And the cases of *Whaley v. Norton*, 1 Vern. 483. and *Matthew v. Hanbury*, 2 Vern. 187, were cited. In the last of these cases the Court thought the case much stronger for relief, where the bill was brought by the executor than where it was brought by the party himself.

On the other side it was argued, That this was not the case of a raw, unexperienced young man, nor of a doting old man; nor was it the case of a bill brought to augment assets, for the sake of creditors, Hill having left considerably to the plaintiff, his brother. That there was no evidence of fraud in obtaining the bond: on the contrary, it was the voluntary act of Hill, out of gratitude for an act of generosity of the defendant in refusing the £1000. That it was too much to say Hill could not make a provision for her. That no principles of equity restrain a [643] person of an immoral character from receiving a bounty. That Perry's evidence was not to be regarded; a single instance of prostitution after she went to be maintained by Hill. That it was not to the reputation of Perry to disclose it, which he was not obliged to do; and probably it was with the knowledge of Hill, with whom he was intimate.

Lord CAMDEN, Chancellor:

I am clear in my opinion, that the plaintiff is not entitled to relief. The cases which have been determined against securities given to common prostitutes went upon the circumstance of the securities being given previous to the cohabitation; a consideration which being *turpis* in its nature, the Court has relieved against them. In this case, the bond was not given for a consideration, but was voluntary. Hill had resort to her for near two years

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before he gave her the bond. Past services could not be a consideration at law, and nothing was stipulated for the future. There is no principle in equity which says a man may not give a voluntary bond to a common prostitute: it would be going but a little further to say he could not give her money without her being liable to be called upon for it. There is no circumstance of fraud in this case; and I do not think that in the case of a voluntary bond, the obligee being a common prostitute is of itself a sufficient ground for relief. As to Perry's evidence, I lay no weight on the act of familiarity with him. He appears to have been intimate with Hill; was the person that first introduced Hill to the defendant; and probably was in partnership with Hill in the maintaining her, or at least his familiarity with her was known to Hill.

Dismiss the Bill.

ENGLISH NOTES.

There is a well recognised distinction between securities given as an inducement to future illicit intercourse and those given as a recompense for past cohabitation.

The former class of securities are absolutely void both at law and in equity, and though valuable or good consideration be given, yet if the consideration is in part an agreement (whether carried out or not) for continuance of illicit intercourse, the instrument will be void. *Gray v. Mathias* (1800), 5 Ves. 286, 5 R. R. 48; *Bullmore v. Willyams* (1863), 32 Beav. 574.

But where a security is given as a consideration for past cohabitation by an unmarried man, the Court may take this for a lawful and conscientious consideration, and the security will generally be held to be good: *Turner v. Vaughan*, 2 Wils. 339; *Hill v. Spencer*, *supra*.

But the consideration of past cohabitation though lawful and conscientious is not valuable, and accordingly the security will not be supported unless it is under seal and executed. A mere agreement not under seal to provide for a forsaken mistress is not enforceable. *Whaley v. Norton* (1687), 1 Vern. 484; *Matthews v. Lane* (1816), 1 Madd. 558; *Binnington v. Wallis* (1821), 4 B. & Ald. 650.

Where a security is given solely in consideration for past cohabitation the mere fact that the illicit intercourse is continued is not sufficient to avoid the security: *Re Vallance*, *Vallance v. Blagden* (1884), 26 Ch. D. 353, 50 L. T. 574, 32 W. R. 918.

Where the consideration for a security is past cohabitation with a man who to the woman's knowledge was married, equity will not as a general rule assist the woman to enforce the security: *Priest v. Parrot* (1751), 2

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Ves. Sen. 160; but if there are children the Court will uphold the instrument as a provision for the mother and her children. *Kaye v. Moore* (1822), 1 Sim. & St. 61.

A married man, however, will not be relieved by equity on his own application against a security given to a woman in consideration of past cohabitation, at all events where he has had children by her. *Spicer v. Hayward*, Pre. Ch. 114; see *Annandale v. Harris* (1727), 2 P. Wms. 432.

Securities though executed under seal in consideration of past cohabitation, being merely voluntary, will be postponed to the claims of creditors of the grantor or obligor upon his general estate. *Lady Cor's Case* (1734), 3 P. Wms. 339; see *Robinson v. Lee* (1749), 1 Ves. Sen. 251. But, if the personalty is insufficient, the holder of the security may claim payment of the real assets, if there be any, and such claim will be preferred to the claims of legatees. *Jones v. Powell*, 1 Eq. Cas. Ab. 84, 143.

AMERICAN NOTES.

See notes, *ante*, vol. 6, p. 335. Parsons says (1 Contracts, p. *436): "It seems to have been held in England, formerly, that while a promise in consideration of future illicit intercourse was certainly void, a promise in consideration of past cohabitation, especially if grounded upon seduction by the promissor, was sufficient. It appears to be now held that the consideration is equally insufficient in either case." This is warranted by *Wallace v. Rapplege*, 103 Illinois, 229 (with a doubt as to a sealed contract as to past cohabitation); and in *Massey v. Wallace*, 32 South Carolina, 149, a sealed note given to a woman in consideration of future illicit intercourse was held void.

A promise by the putative father to pay the mother for the support of their illegitimate child is valid. *Hook v. Pratt*, 78 New York, 371; 34 Am. Rep. 539; *Bunn v. Winthrop*, 1 Johnson Chancery (N. Y.), 329. *Contra*: *Nine v. Starr*, 8 Oregon, 49.

In *Phillips v. Pullen*, 50 New Jersey Law, 443, it is said: "This contention is first put on the ground that the consideration was illegal, being for the past illicit connection with Pullen's wife. But this is a misconception of the transaction. If the contract to pay had been based on Pullen's previous consent to the illicit connection, it might well be said that the contract was void because given for an immoral consideration. But the agreement was not of that character. It was entitled in a suit brought to recover damages for a tortious invasion of marital rights. It provided for a settlement of the claim so made by fixing the amount of damages resulting from Phillips' alleged wrongdoing, to be paid by him. There is no taint of illegality in such a transaction."

No. 13. — Palmer v. Bate, 2 Brod. & Bing. 673. — Rule.

No. 13. — PALMER v. BATE.

(C. P. 1821.)

RULE.

A MORTGAGE of the pay or salary attached to the performance of public duties is *malum in se* independently of Statutory enactment, and void.

Palmer and others v. Bate and others.

2 Brod. & Bing. 673-679 (s. c. 6 Moore, 28 ; 23 R. R. 535).

Salary of Public Office. — Mortgage. — Illegality.

[673] An assignment to trustees of all the emoluments and profits which, during the life of A. and his continuing to hold the office of clerk of the peace, should arise or become due to him as clerk of the peace, or in respect of his office, after deducting the salary or allowance of his deputy for the time being, upon trust to pay the interest arising on certain debts due from A., and from time to time render the surplus and residue, after satisfying the trusts to A., is invalid.

His Honour the VICE-CHANCELLOR, by decree made on the hearing of this cause, on the 3rd June, 1820, ordered a case, of which the following is the substance, to be stated for the opinion of this Court. The defendant, Vaughan, who is clerk of the peace for the city and liberty of Westminster, which office he has held since the year 1802, under the *custos rotulorum* of the city, liberty, and county, and from the time of his appointment, has executed the office by his deputy Lorenzo Stable, an attorney residing within the liberty, by indenture, dated the 25th January, 1806, assigned to George Palmer and William Loaden, their executors, administrators, and assigns, "All and singular the income, emoluments, produce and profits whatsoever, which, during the life of him, the said Thomas Wright Vaughan, and his continuing to hold the said place, or office of clerk of the peace for Westminster, should arise or become due, or payable to him, the said Thomas Wright Vaughan, as clerk of the peace for Westminster, or otherwise by reason, or in respect of his said place or office, and all arrears thereof, then due, after deducting the salary or allowance of the deputy for the time being, of him, the said Thomas Wright Vaughan, in the said office, and all other expenses attending the execution of the

No. 13. — Palmer v. Bate, 2 Brod. & Bing. 673-675.

said office. To hold, receive and take the said income, emoluments, produce and profits, of all and singular other the premises thereby assigned, thenceforth * unto the said George Pal- [* 674] mer and William Loaden, their executors, administrators, and assigns, upon trust, that the said George Palmer and William Loaden, and the survivor of them, his executors, administrators, and assigns, should in the first place, by and out of the same, retain and deduct, and reimburse themselves, and himself, certain costs and expenses therein particularly mentioned, and all such costs, charges, and expenses, as they, or any of them should have incurred, or become liable to pay, in or about the execution of the aforesaid trust. And should, and would in the next place, pay and apply the same in, or towards payment and discharge of the interest, which from time to time should become due, or owing to Thomas Baylis and Samuel Ridge, respectively," on certain debts, due from T. W. Vaughan to Baylis and Ridge, according to the true intent and meaning of a covenant contained in the indenture. "And should from time to time render and pay all the surplus and residue of the said income, emoluments, produce and profits, which should from time to time remain, after answering and satisfying the trusts and purposes aforesaid, unto the said Thomas Wright Vaughan, his executors, administrators, or assigns, for his or their proper use and benefit."

The defendant, by the same deed, constituted the trustees, his attorneys, to demand, recover and receive the said income, emoluments and profits, and to give receipts and discharges for the same; and covenanted, that neither he, his executors or administrators, would at any time thereafter, by himself or themselves, or by any agent or agents, receive or take into his or their possession, the said income, emoluments, produce and profits, or any part thereof, or revoke, or make void, the powers and authorities thereinbefore contained.

*The questions for the opinion of the Court were, [*675]

Whether the assignment of the income, emoluments, produce and profits of the office, or place of clerk of the peace for Westminster, after deducting the salary or allowance of the deputy for the time being, of the defendant Thomas Wright Vaughan, in the said office, by the said defendant, Thomas Wright Vaughan, to the plaintiffs, George Palmer and William Loaden, by the indenture in the pleadings mentioned, dated the 25th Jan-

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uary, 1806, is a good and effectual assignment, and valid in the law? And whether the said George Palmer and William Loaden could legally and of right receive and take the income, profits, emoluments, and produce of the said place or office, under, and according to the true intent, meaning and effect of the said deed of assignment, upon, and subject to the trusts, intents, and purposes therein expressed and declared of and concerning the same?

The case was argued on a former day in this Term.

Lawes, Serjt., for the plaintiffs:—

There is no authority immediately applicable to this case: the decisions regard offices of a different nature. It is not contended that the office is saleable; it is a public office relative to the administration of justice, and the sale of it would be illegal by stat. 5 & 6 Edw. VI., c. 16. But this is merely an assignment of the profits of an office which is regulated by stats. 37 Hen. VIII., c. 1, s. 3, and 1, W. & M. c. 21, s. 5. By the former, the nomination of clerks of the peace is given to the *custos rotulorum*; by the latter, a residence in the county is required; and, by both, it is enacted, that the office

may be executed by deputy, to be approved of by the *custos* [*676] *rotulorum*. That the office is a freehold appears from **Reg.*

v. The Clerk of the Peace of Cumberland, 11 Mod. 80; and *The King and Queen v. Evans*, 12 Mod. 13; so much so that the succeeding *custos rotulorum* cannot displace the actual clerk. *Harcourt v. For*, 12 Mod. 42. Where profits are annexed to a freehold office, it cannot be said that the officer has not the disposal of them. Nor will public justice suffer from the assignment of them; the fulfilment of the duties of the office by deputy being provided for. *Godolphin v. Tudor*, 1 Salk. 468, recognises the right of the principal to dispose of the profits of a public office, and *Stuart v. Tucker*, 2 W. Bl. 1137, shows that the use of the half-pay of a military officer is assignable. A close analogy may be found in the assignment of the profits of ecclesiastical benefices; the only requisite in such cases is, that the cure be provided for, as the execution of the office is in the present case.

DALLAS, Ch. J.: Suppose the deputy dies, and the *custos rotulorum* refuses to approve the nomination of a new deputy, what becomes of the performance of the duties of the office? Again, suppose that the deputy becomes ill, the principal must then perform the duties of the office, but how is he to perform those duties when there is nothing to sustain him?

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PARK, J.: The case of *Stuart v. Tucker* was much shaken by subsequent decisions. In *Barwick v. Reade*, 1 H. Bl. 627 (2 R. R. 808), it was held, that the full pay of a military officer could not be assigned by way of annuity; and in *Arbuckle v. Cowtan*, 3 Bos. & P. 321 (7 R. R. 781), Lord ALVANLEY, Ch. J., in delivering judgment, says, "It is now clearly established, that the half-pay of an officer is not assignable, and unquestionably any *salary, paid for the performance of a public duty, ought [* 677] not to be perverted to other uses than those for which it is intended. Notwithstanding the case of *Stuart v. Tucker*, in which it was held that the half-pay of an officer was assignable in equity, it was expressly decided, in *Flarty v. Odum*, 3 T. R. 681 (1 R. R. 791), that it was not assignable at all, which decision met with general approbation."

Lens, Serjt., *contra*:

It is admitted, that the office in question is not saleable; if, then, the officer cannot sell, can it be contended that he may pledge his office for any amount? The argument drawn from the provision for the deputy is beside the question. The principal cannot withdraw himself, otherwise there might be a hindrance of public justice. In the present case, the office is substantially no longer in the officer, but in those to whom he assigns the produce of it. Supposing the deputy to fail, there would be no one to perform the duties of the office. A military officer cannot assign his half-pay. *Flarty v. Odum*. And the analogy drawn from cases of sequestration does not assist the plaintiff. Those cases turn on the old law of lay-fee. On suggestion that the clergyman has no lay-fee, the bishop levies, providing for the cure by appointing a curate and paying him out of the proceeds of the execution. The case of *Godolphin v. Tudor* is not in point. The officer here is the mere nominal possessor, and, substantially, has sold his office. *Blackford v. Preston*, 8 T. R. 89 (4 R. R. 598), *Parsons v. Thompson*, 1 H. Bl. 322 (2 R. R. 773), and *Osborne v. Williams*, 18 Ves. 379 (11 R. R. 218), show in what light contracts of this nature are viewed both at law and in equity. In *Harrington v. Klopprogge*, 2 Brod. & Bing. 678 n., the office, the profits [* 678] of which the Court held might be well assigned, was only that of private secretary to Lord Holderness.

* Lawes, in reply. [* 679]

Godolphin v. Tudor decides, that an officer has a right

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to dispose of the profits of his office. If an officer may dispose of the profits to his deputy, he may, also, assign them to his creditors.

Cur. adv. vult.

The following certificate was now sent : —

"This case has been argued before us by counsel. We have considered it, and are of opinion, that the assignment of the income, emoluments, produce, and profits of the office or place of clerk of the peace for Westminster, after deducting the salary or allowance of the deputy for the time being, of the defendant, Thomas Wright Vaughan, in the said office by the said defendant, Thomas Wright Vaughan, to the plaintiffs, George Palmer and William Loaden, by the indenture in the pleadings mentioned, dated the 25th day of January, 1806, is not a good or effectual assignment, nor valid in the law.

"And that the said George Palmer and William Loaden are not entitled legally and of right to receive and take the income, profits, and emoluments, and produce of the said place or office, under and according to the true intent, meaning, and effect of the said deed of assignment, upon and subject to the trusts, intents, and purposes therein expressed and declared of and concerning the same.

"R. DALLAS.

"J. A. PARK.

"J. BURROUGH.

"J. RICHARDSON.

"May 31st, 1821."

ENGLISH NOTES.

The above Ruling Case clearly establishes and explains the rule that the emoluments of a public office are not assignable by way of mortgage or otherwise.

This rule has been expressly affirmed by the Legislature as regards the pay or salaries of officers in the employment of the Crown. By the statute (5 & 6 Edw. VI., c. 16) all assurances of any office concerning the administration or execution of justice, or any service of trust, or the receipt, control, or payment of the king's revenues or customs, or the custody of fortresses, or the clerkship in any Court of record where justice is to be administered, were declared to be void, as against the person making the assurance, with an exception in favour of offices of inheritance, and of the keeping of parks or forests. This Act (preserving the exceptions) was afterwards extended by the 49 Geo. III., c. 126,

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to Scotland and Ireland, and to all offices in the gift of the Crown, civil, naval, and military commissions and employments under the control of the different officers of state.

By the 47 Geo. III., sess. 2. c. 25, s. 2, which is now repealed but virtually re-enacted by the 44 & 45 Vict., c. 58, s. 141, all assignments of and charges on or agreements to assign or charge any deferred pay or military reward, pension, allowance or relief payable to any officer or soldier of Her Majesty's forces, or his widow, child, or other relatives are declared void. And by the 28 & 29 Vict., c. 73, ss. 4 & 5, all assignments, &c. relating to naval pensions, half-pay, wages or allowances, payable to officers, seamen, or marines or their widows or other persons are void. See *Hannington v. DuChatel* (1781), 1 Bro. C. C. 124; *Lidderdale v. Duke of Montrose* (1791), 4 T. R. 248 (2 R. R. 375); *Garforth v. Fearon* (1787), 1 H. Bl. 327 n. (2 R. R. 778); *Lloyd v. Cheetham* (1860), 3 Giff. 171, 30 L. J. Ch. 640, 4 L. T. 576, 9 W. R. 924; *Willcock v. Terrell* (C. A. 1878), 3 Ex. D. 323, 39 L. T. 84.

Civil Service Pensions are not within either of the last mentioned Acts and are therefore generally assignable. *Sansom v. Sansom* (1879). 4 P. D. 69, 48 L. J. P. D. & A. 25, 39 L. T. 642, 27 W. R. 692. In particular the following have been held to be assignable: — Compensation to a custom-house officer for the loss of office (though revocable at the pleasure of the government); *Tunstall v. Boothby* (1840), 10 Sim. 542; pension to commissioner of bankrupts: *Spooner v. Payne* (1852), 1 DeG. M. & G. 383; moneys payable to the representatives of an Indian judge, if he should die in, and after six months' possession of office: *Arbuthnot v. Norton* (1846), 5 Moo. P. C. 219: prize money and the captor's inchoate or possible interest in it before grant by the Crown: *Alexander v. Duke of Wellington* (1830), 2 Russ. & Myl. 35; a pension granted to a County Court Judge for past services: *Willcock v. Terrell*, *supra*; or to a Judge of a Crown Colony. See *Ex parte Huggins* (C. A. 1882), 21 Ch. D. 85, 51 L. J. Ch. 935, 47 L. T. 559, 30 W. R. 878.

Pensions granted for supporting the grantee in the performance of future services are not assignable (see 5 Anne, c. 4). *Davis v. Duke of Marlborough* (1818), 1 Swanst. 74.

By the Bankruptcy Act, 1883 (46 & 47 Vict., c. 52), s. 53, power is given to the trustee in bankruptcy of an officer in the army or navy or of person employed in the Civil Service of the Crown, to receive for distribution amongst his creditors so much of the pay or salary of the bankrupt as the Court, with consent of the Chief Officer of the department in which the bankrupt is employed, may direct.

Besides pay and pensions of public officers and the emoluments of pensions for ecclesiastical pensions (as to which see the next Ruling Case, No. 14, p. 91 *post*, and the notes thereon), the following kinds

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of property are held not to be capable of being assigned or charged: — Alimony: *Re Robinson* (C. A. 1884), 27 Ch. D. 160, 53 L. J. Ch. 986, 33 W. R. 17; permanent maintenance after divorce: *Watkins v. Watkins* (C. A.) 1896, P. 222, 65 L. J. P. 75, 74 L. T. 636, 44 W. R. 677; the allowance made in lunacy to the committee of a lunatic: *Re Weld* (C. A. 1882), 20 Ch. D. 451, 51 L. J. Ch. 913, 46 L. T. 397, 30 W. R. 385.

AMERICAN NOTES.

This case is cited in Mechem on Public Officers, sect. 874, and Throop on Public Officers, sect. 42, and as to unearned salary the principle prevails here. *Bliss v. Lawrence*, 58 New York, 442; 17 Am. Rep. 273 (citing the principal case); *Bangs v. Dunn*, 66 California, 72; *Schloss v. Hewlett*, 81 Alabama, 266; *Webb v. McCauley*, 4 Bush (Kentucky), 10. *Contra*: *State v. Hastings*, 15 Wisconsin, 75; *Brackett v. Blake*, 7 Metcalf (Mass.), 335; 11 Am. Dec. 442; *Dewey v. Garvey*, 130 Massachusetts, 86; *Payne v. Mayor*, §c., 4 Alabama, 333; 37 Am. Dec. 744.

Bliss v. Lawrence contains a careful review of the cases and cites the principal case, and distinguishes the Massachusetts cases. The Court said: "The public service is protected by protecting those engaged in performing public duties; and this, not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service, by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work, at such periods as the law has appointed for their payment.

"It is argued that a public officer may better submit to a loss, in order to get his pay into his hands in advance, than deal on credit for his necessary expense. This may be true in fact, in individual instances, and yet may in general not be in accordance with the fact. Salaries are, by law, payable after work is performed and before, and while this remains the law, it must be presumed to be a wise regulation, and necessary, in the view of the law-makers, to the efficiency of the public service. The contrary rule would permit the public service to be undermined by the assignment to strangers of all the funds appropriated to salaries. It is true that in respect to officers removable at will, this evil could in some measure be limited to their removal when they were found assigning their salaries; but this is only a partial remedy, for there would still be no means of preventing the continued recurrence of the same difficulty. If such assignments are allowed, then the assignees, by notice to the government, would, on ordinary principles, be entitled to receive pay directly and to take the place of their assignors in respect to the emoluments, leaving the duties as a barren charge to be borne by the assignors. It does not need much reflection or observation to understand that such a condition of things could not fail to produce results disastrous to the efficiency of the public service.

"We do not understand that the English decisions really rest on any grounds peculiar to that country, although sometimes expressed in terms which we might not select to express our views of the true foundation of the

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doctrine in question. The substance of it all is, the necessity of maintaining the efficiency of the public service by seeing to it that public salaries really go to those who perform the public service. To this extent, we think, the public money of every country must go to secure the end in view."

No. 14. — GRENFELL v. THE DEAN AND CANONS OF WINDSOR.

(CH. 1840.)

RULE.

ECCLESIASTICAL persons are not public officers, and accordingly there is no rule of public policy, independent of Statutory enactments, which prevents them from assigning or charging their temporalities.

Grenfell v. The Dean and Canons of Windsor and others.

2 Beavan, 544-550.

Ecclesiastical Person. — Mortgage of Temporalities.

A canon of Windsor granted the canonry and the profits, &c., to the [544] plaintiffs, to secure a sum of money. So far as it appeared on an interlocutory application, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. There was no cure of souls and the only duties were residence within the castle and attendance in the chapel twenty-one days a year. *Held*, upon this state of circumstances, that the security was valid, and a receiver of the profits was appointed.

Principles of public policy, on which pay, pensions, &c., are held unalienable.

In April, 1829, the defendant, the Rev. R. A. Musgrave, was appointed by letters patent, one of the prebends or canons of the collegiate church or free chapel of St. George, within His Majesty's castle at Windsor, an appointment which produced an income of about £1200 a year.

Being in want of money, Mr. Musgrave, in October, 1838, granted to the plaintiffs the said prebend or canonry, and all the annual income arising from renewal fines, rents, and other perquisites, emoluments, and advantages to which he was entitled as one of such prebends or canons, and he also assigned to them two several policies of insurance, for securing to the plaintiffs the repayment of the sum of £12,000.

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It appeared from the answer of Mr. Musgrave, that the income arose from estates possessed by the corporation, the rents and proceeds of which were usually divided half-yearly between the dean and twelve canons; but it did not appear that there was any property vested in the deans and canons independently of the corporation.

There did not appear to be any spiritual duties attached to the office, nor any cure of souls, but the answer represented, that the corporation was governed by certain statutes and ordinances, whereby certain duties were imposed upon the members of the said corporation to be by them performed, each member of the

said corporation having the privilege of residing in a [*545] *house within the walls of the said castle of Windsor;

and that if any member of the corporation failed to perform his appropriated duties, he, by virtue of the said statutes and ordinances, forfeited his right to share in the division of the surplus income of the said corporation, and in lieu thereof was entitled to receive a small fixed stipend, of the amount, as the defendant believed, of £25 a year only; and that the members of the corporation were in such cases entitled to the residue of his share of the surplus income of the corporation. That one of the duties, by the said statutes and ordinances imposed upon each of the said canons, was to reside in one of the said houses within the walls of the said castle of Windsor, and to attend divine service in the said chapel of St. George, at Windsor, twenty-one days in each year.

The defendant, Mr. Musgrave, having made default in payment of the interest and in keeping up the policies, the plaintiff's filed this bill for the purpose of obtaining payment, and for an injunction and receiver; on the 11th of January, 1840, an order was made, on affidavit, before answer, restraining the dean and canons from paying, and the defendant from receiving, the income of the canonry, and for the appointment of a receiver.

The defendant, Mr. Musgrave, having put in his answer, it was now moved on his behalf, to discharge the order for an injunction and receiver.

Mr. G. Richards, in support of the motion, contended, that it was contrary to public policy to permit the assignment of ecclesiastical preferments like the present.

That the statutes of 13 Eliz., c. 20, and 14 Eliz., c. 11, s. 5, repealed by the 43 Geo. III., c. 84, but partly revised

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* by the 57 Geo. III., c. 99, though not strictly applicable [* 546] to the present case (there being here no cure of souls), plainly showed that the policy of the law and the Legislature were opposed to the assignment of property of this description.

That this was an office of an ecclesiastical nature having duties attached to it, namely, residence and attendance in St. George's Chapel, and on the non-performance of which, the income would be forfeited: and as the receiver could not perform these duties his appointment would therefore be nugatory. That the object of the appointment was to add dignity to the sovereign by the attendance of the canons in the Royal Chapel, and that on the same grounds of public policy which existed in *Davis v. The Duke of Marlborough*, 1 Swan. 79, such an office was not assignable; in that case Lord ELDON said, that "a pension for past services may be alienated, but a pension for the supporting the grantee in the performance of future duties is not assignable." In the same way half-pay is not assignable, future services being contemplated: In *Cooper v. Reilly*, 2 Sim. 560, 1 Russ. & Myl. 560, it was held that the salary of assistant parliamentary counsel to the treasury was not, on grounds of public policy, assignable, and that the Court would not appoint a receiver of it. *Alexander v. The Duke of Wellington*, 2 Russ. & Myl. 35 (34 R. R. 1), was also cited.

Mr. Pemberton and Mr. W. T. S. Daniel, *contra*, contended, that it did not appear whether this was an ecclesiastical appointment or not, but it was confessedly one without cure of souls, and considering the alleged duties, * was a mere sinecure [* 547] income, assignable like other property. That there existed no rule of public policy, independent of the restraining statutes, which prevented an ecclesiastic from dealing with his temporalities. *Metcalf v. The Archbishop of York*, 6 Sim. 224, 1 Myl. & Cr. 547. That the case of *Cooper v. Reilly* did not apply; in that case there was no patent place, no permanent office, but a right to receive an annual salary for certain duties, in default of the performance of which, no salary was payable: that it was manifest that such duties could not be performed by a receiver; and that this must have formed the ground of the decision on the motion, though in truth that case had never been decided on the merits.

That even a living with cure of souls could be sequestered, and the profits taken by a creditor; and it would be strange indeed if an office like this, without any further duties than residence and

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attendance at church, should be exempted from the usual legal remedies.

That it did not appear that any forfeiture would be insisted on by the other canons, and the receiver would at least be able to receive the income of £25, which was payable on all events.

Mr. Richards, in reply. A living may be sequestered; the profits are then taken by operation of law under the superintendence of the bishop, but an assignment of it is wholly void. The point in this case is not whether the canonry can be taken under a judgment, but whether it is assignable.

[* 548] * The MASTER OF THE ROLLS (Lord LANGDALE).

The plaintiffs, being under the necessity of filing this bill, in consequence of the neglect of the defendant to pay either principal or interest on the money advanced, have obtained an order for a receiver. I do not enter into the question whether the order was opposed at the time, for the defendant had clearly a right to pursue any course he pleased upon that occasion, and supposing him to have then thought, or to have been then advised, that this order was proper, still it was perfectly competent for him afterwards, upon a more careful inquiry, to bring under the consideration of the Court the question, whether the order ought to be sustained. It is now contended that the order should be discharged on two grounds; the first is, that it is an order which cannot be enforced for any useful or profitable purpose to the plaintiffs without the assent and concurrence of the defendant, Mr. Musgrave. Mr. Musgrave, being a canon of Windsor, has, it is said, a duty to perform, that is, he is to reside twenty-one days within the precincts of the castle of Windsor, and during that time he is to attend divine service, and if he does not, the aliquot share or part of the general revenues of the corporation which he would otherwise be entitled to, is to be reduced to a certain small sum. He therefore says, "If I do not choose to attend during that time, the small sum only, and not the larger sum, will have to be received, and therefore the plaintiffs and the receiver will be unable to receive the income for the purpose of applying it in diminution or in exoneration of my debt." It cannot be supposed that Mr. Musgrave will be so unwise, as, rather than give the plaintiffs the benefit of that which they are clearly entitled to, wholly to neglect to perform the duty which entitles him to the receipt of this [* 549] income, and thus leave the debt standing, and the * interest

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accumulating upon it. I cannot presume that any such degree of absurdity will mark his future conduct.

In the next place it is said that he has no right to assign this canonry, because the share of the revenues was given to him in consideration of certain future duties to be performed. Now if it had been made out that the duty to be performed by him was a public duty, or in any way connected with the public service, I should have thought it right to attend very seriously to that argument, because there are various cases in which public duties are concerned, in which it may be against public policy, that the income arising for the performance of these duties should be assigned; and for this simple reason, because the public is interested, not only in the performance from time to time of the duties, but also in the fit state of preparation of the party having to perform them. Such is the reason in the cases of half-pay where there is a sort of retainer, and where the payments which are made to officers, from time to time, are the means by which they, being liable to be called into public service, are enabled to keep themselves in a state of preparation for performing their duties. If, therefore, they were permitted to deprive themselves of their half-pay, they might be rendered unable promptly to enter upon their duties when called upon, and the public service would be thereby greatly injured. So also, where a pension or remuneration is given for a purpose which tends less directly to the public benefit, as for instance was the case in *Davis v. The Duke of Marlborough*; there the pension was given to the Duke of Marlborough as a memento of the gratitude of the nation, and as a reward for his distinguished public services; and it was there the intention of the Legislature that it should be kept in mind that it was for * those great services it was given. In that case [*550] the pension was held inalienable, because it was considered that one of the objects of giving the pension, namely, for having a perpetual memorial of national gratitude for public services, would be entirely lost; and so in the course of that case Lord Eldon said, in the way of illustration, and in allusion to the pension of a great public officer, that it could not be aliened, because that public officer must not be allowed to fall into such a situation as to make it difficult for him, in consequence of any pecuniary embarrassment, to maintain the dignity of his office. With respect to the case of *Cooper and Reilly*, some doubts have been

expressed as to the propriety of the decision on the motion for a receiver; but the question was, whether the salary was assignable on grounds of public policy, and that depended on the nature of the duty and the interest of the public to secure the payment of the salary to the person by whom the duty was to be performed. If in this case the residence in Windsor Castle, and the attendance on divine service, had been stated in the answer, or in any way shown to be for the benefit of the public, or for the maintenance of the dignity of the sovereign for the benefit of the public, I should have thought the case worthy of a very different consideration. But from all which is stated in this answer that is not the case; it is a service to be performed for the benefit of the party himself; and, therefore, upon the case as it now stands upon this answer, and without saying there may not be other facts which may be material to be ultimately considered, it appears to me that the security of the plaintiffs is valid, and I must therefore refuse the motion with costs.

ENGLISH NOTES.

Several statutes have been from time to time enacted to restrain ecclesiastical persons from assigning or charging the emoluments of their offices.

By 13 Eliz., c. 20, it was enacted, ‘‘ That all chargings of any benefice with cure thereafter, with any pension or with any profit out of the same to be yielded and taken, thereafter to be made, other than rents to be received upon leases thereafter to be made, according to the meaning of that Act, should be *utterly void*.’’ By 3 Car. I., c. 4, s. 2, this Act was made perpetual.

By 43 Geo. III., c. 84, 13 Eliz., c. 20, and 3 Car. I., c. 4, s. 2, were wholly repealed. The 57 Geo. III., c. 99, repealed 43 Geo. III., c. 84, and also repealed part of 13 Eliz., c. 20, but did not repeal in terms the clause relating to the charging of livings.

The 57 Geo. III., c. 99, was repealed by 1 & 2 Vict., c. 106 s. 1 except such part as repealed any former Acts: and 1 & 2 Vict., c. 106, s. 1, has been repealed by 37 & 38 Vict., c. 96; but 13 Eliz., c. 20, so far as relates to charges on benefices, is still in force. See *Hawkins v. Gathercole* (1854), 6 De G. M. & G. 1, at pp. 20, 21; *Garrett v. Bradley* (H. L. 1878), 3 App. Cas. 944, at pp. 950, 951, 48 L. J. Ex. 186, 39 L. T. 261, 26 W. R. 698.

The effect of these statutes is that the emoluments of church livings and other ecclesiastical offices to which the cure of souls is annexed cannot be assigned or charged. So, the following attempts to charge such

No. 14. — *Grenfell v. The Dean and Canons of Windsor.* — Notes.

emoluments have been held to be abortive and of no effect: — a mortgage of pew rents by the vicar of a district church: *In re Lereson, Ex parte Arrowsmith* (C. A. 1878), 8 Ch. D. 96, 47 L. J. Bk. 46, 38 L. T. 547, 26 W. R. 600; a lease of a vestry and tithes accompanied by a receiver-ship deed: *Waltham v. Crofts* (1851), 6 Ex. 1, 20 L. J. Ex. 257; a trust deed of the income of a benefice for the benefit of the incumbents' creditors: *Alchin v. Hopkins* (1834), 1 Bing. N. C. 99.

But these disabling statutes are construed strictly. So the property, attached to a canonry or prebendary, which are ecclesiastical offices without cure, may be the subject of a mortgage or charge. *Grenfell v. Dean, &c. of Windsor, supra*; see *Dean and Chapter of Norwich Case*, 3 Co. Rep. 73, 75 b; *Doe v. Musgrave* (1840), 1 Man. & Gr. 625. So also where by an Order in Council made under the statutes 13 & 14 Vict., c. 98, and 23 & 24 Vict., c. 142, upon the union of two benefices in the city of London, certain annuities were granted to a retiring incumbent so long as he should perform the duties of curate of the united parishes, it was held that the retiring incumbent had no benefice with cure, within the meaning of the statute 13 Eliz., c. 20, and that he could therefore make a valid mortgage of the annuities. *McBean v. Deane* (1885), 30 Ch. D. 520, 55 L. J. Ch. 19, 53 L. T. 701, 33 W. R. 924.

A receiver has been appointed of the profits of a college fellowship, on the grounds that neither public policy nor the language of the statute prevent them from being assigned or charged. *Feistel v. King's College, Cambridge* (1847), 10 Beav. 491.

On the same grounds a mortgage of the salary of a workhouse chaplain, payable out of local poor rates, was held to be valid. *Re Mirams, Ex parte Official Receiver*, 1891, 1 Q. B. 594, 60 L. J. Q. B. 397, 64 L. T. 117, 39 W. R. 464.

Numerous statutes have been passed empowering ecclesiastical persons to mortgage or charge the property attached to their offices for the purposes of building, repairing, improving, or purchasing suitable residences: — 17 Geo. III., c. 53, 21 Geo. III., c. 66, and 1 & 2 Vict., c. 23, giving powers to incumbents to mortgage generally: see also 5 & 6 Vict., c. 26, s. 13; 34 & 35 Vict., c. 43; 35 & 36 Vict., c. 96; 44 & 45 Vict., c. 25; 49 & 50 Vict., c. 34; and 50 & 51 Vict., c. 8, giving powers to incumbents to borrow on mortgage from the governors of Queen Anne's Bounty; 1 & 2 Vict., c. 106, ss. 62, 70, empowering bishops on avoidance of a benefice to borrow on mortgage of the glebe, &c., for a residence: 3 & 4 Vict., c. 113, s. 59, and 5 & 6 Vict., empowering deans and canons with the consent of the Ecclesiastical Commissioners to borrow for residences.

By the Universities and College Estates Act (21 & 22 Vict., c. 44), powers of mortgaging their estates are given to the Universities and

No. 15. — King v. Smith, 2 Hare, 239. — Rule.

Colleges of Oxford, Cambridge, Dublin, Winchester, and Eton Colleges, with the consent of the Copyhold Commissioners (now the Board of Agriculture).

By the Universities and Colleges Estates Acts Extension Act, 1860 (23 & 24 Vict., c. 59), further powers are conferred; and as to Winchester and Eton Colleges, see 31 & 32 Vict., c. 118, ss. 24, 25, and 28; and see 43 & 44 Vict., c. 46.

SECTION III. — *Primary Rights and Obligations of the Mortgagee.*

No. 15. — KING v. SMITH.

(CH. 1843.)

RULE.

EQUITY, regarding the mortgaged property with its produce as a security for the mortgage debt, will restrict the rights of ownership of a mortgagor in possession within such bounds as may prevent detriment to the mortgagee.

King v. Smith.

2 Hare, 239–245.

Mortgagor in Possession. — Restraint against selling Timber.

[239] The Court will not, on the application of a mortgagee out of possession, restrain the mortgagor from proceeding to fell timber growing upon the mortgaged estate, unless the security is insufficient.

A mortgagee may sustain a suit against the executors of the mortgagor for a sale of the property comprised in the security, and for the payment of any deficiency out of the general estate of the testator, *semble*.

What proportion the value of the mortgaged property should bear to the mortgage debt, in order to be deemed a sufficient security within the rule under which the Court acts in restraining waste by the mortgagor, *quære*.

W. Smith conveyed and surrendered certain freehold and copyhold estates to the use of J. Reid and his heirs, by way of mortgage, to secure £2700 and interest. W. Smith, by his will, gave all his real and personal estate to the defendant S. Smith (who was also his heir-at-law, customary heir, and sole executor), “in hopes that he might be able to pay his (the testator’s) just debts

and find a surplus for his trouble." J. Reid devised his legal interest in the mortgaged premises to the plaintiffs, and appointed them his executors. The plaintiffs, by their bill, charged, that the mortgaged premises were a "scanty security" for the principal and interest due, and that the plaintiffs were entitled and claimed to be specialty creditors upon the general estate of the mortgagor for the deficiency; and that, to ascertain the same, the mortgaged premises ought to be sold. The bill prayed an account of the mortgaged debt, — a sale accordingly, — and payment out of the proceeds; and, if the same were insufficient, that the plaintiffs might be declared to be specialty creditors upon the estate for the deficiency; that if necessary, the suit might be taken as being on behalf of the plaintiffs, and all other the unsatisfied creditors of W. Smith, and the personal and real estate duly administered and applied.

After appearance, and before answer, the plaintiffs filed their supplemental bill, stating that, since the original bill was filed, the defendant had felled, and was proceeding to fell and carry away large numbers of timber and timber-like trees, which were growing on the mortgaged premises, — that many of such trees were *lying upon the lands, and had been advertised [*240] for sale: and praying an account of the trees felled, and of the moneys produced by the sale, and an injunction to restrain the felling and sale of trees from the mortgaged premises.

The plaintiffs moved for the injunction, according to the prayer.

Mr. W. T. G. Daniel, for the motion, cited *Daniel v. Skipwith*, 2 Bro. C. C. 155; *Hippesley v. Spencer*, 5 Madd. 422; *Farrant v. Lovel*, 3 Atk. 723; *Hampton v. Hodges*, 8 Ves. 105; *Car v. Goodfellow*, 8 Ves. 105 n.

Mr. James, for the defendant, argued that the case was not brought within the authority of *Hippesley v. Spencer*, inasmuch as there was no allegation in the bill, and no proof on the affidavits of any deficiency in the security. But the suit was so framed, that the plaintiffs could not have the relief upon it which they sought. They might have sued as mortgagees, and prayed a foreclosure, when they would have had all the rights of an ordinary mortgagee, whatever those rights might be, or they might have sued as general specialty creditors, when if they could have shown the Court that there was a danger of misapplication of the estate by the executor, they might perhaps have obtained an injunction.

But they cannot mix up the characters of mortgagee and general creditor, and thereupon have relief compounded of the rights of both. In *Greenwood v. Taylor*, 1 R. & My. 185, it was [*241] held, that the creditor was not *entitled to his remedy at the same time in both characters, and that decision was not overruled in *Mason v. Bogg*, 2 My. & Cr. 450, *Burney v. Morgan*, 1 Sim. & St. 358, 362. The plaintiffs, moreover, were not in a situation entitling them to relief in equity; for, having the legal estate, they could at any time bring ejectment.

Mr. W. T. S. Daniel, in reply.

[*242] A mortgagee, if he sues in that character only, and *prays a foreclosure, cannot then combine with it his claim as a general creditor; but, if, instead of asking the relief which is peculiar to a mortgagee, namely, foreclosure, he sues as a creditor, he may then, in the same suit, avail himself of the benefit of his mortgagee security. The plaintiffs, in this case, have taken the latter course; they sue as creditors, but offer, at the same time, upon payment of the debt, whether out of that particular estate, or the general estate, to give up their security. *Mason v. Bogg*, 2 My. & Cr. 450; *Parker v. Housefield*, 2 My. & K. 419; *Brocklehurst v. Jessop*, 7 Sim. 442. The filing of the original bill, by the plaintiffs, had the effect of constituting the defendant a trustee of the whole real estate of the testator for the incumbrancers, and he could not, during the *lis pendens*, be permitted to alien any part of that estate.

The VICE-CHANCELLOR (SIR JAMES WIGRAM): —

It is now an established rule, that, if the security of the mortgagee is insufficient, and the Court is satisfied of that fact, the mortgagee will not be allowed to do that which would directly impair the security, cut timber upon the mortgaged premises. It has been argued, that, if the bill be for a foreclosure, when the mortgagee seeks to take the whole estate, the Court will not prevent him, pending that suit, from cutting timber or receiving rents, or doing any other act incident to the ownership; but that, if the plaintiff sued as a general creditor, the Court would give him the relief by injunction. That, however, is not the distinction. The rule would be rather the other way. The [*243] plaintiff, in a foreclosure suit, asks nothing more *than the estate, whilst the plaintiff, in a creditor's suit, seeks the application, not only of the mortgaged estate, but, if necessary,

of the general estate also, in payment of his debt. It is very difficult to suppose that a mere creditor can have any such right as the argument assumes. On what principle is the executor and trustee of real estate to be restrained at the suit of a general creditor from acting according to his judgment in the management of the property?

I think the allegation in the bill, that the mortgaged premises are a scanty security for the debt, is a sufficient foundation for admitting evidence of the value of the estate.

Jan. 13. The VICE-CHANCELLOR: —

The cases decide that a mortgagee out of possession is not of course entitled to an injunction to restrain the mortgagor from cutting timber on the mortgaged property. If the security is sufficient the Court will not grant an injunction merely because the mortgagor cuts, or threatens to cut, timber. There must be a special case made out before this Court will interpose. The difficulty I feel is in discovering what is meant by a "sufficient security." Suppose the mortgage debt, with all the expenses, to be £1000, and the property to be worth £1000, that is, in one sense, a sufficient security; but no mortgagee, who is well advised, would lend his money, unless the mortgaged property was worth one third more than the amount lent at the time of the mortgage. If the property consisted of houses, which are subject to many casualties to which land is not liable, the mortgagee would, probably, require more. It is rather a question of prudence than of actual value. *I think the question which must be tried [*244] is, whether the property the mortgagee takes as a security is sufficient in this sense, that the security is worth so much more than the money advanced, that the act of cutting timber is not to be considered as substantially impairing the value, which was the basis of the contract between the parties at the time it was entered into. I have read the affidavit, and I cannot find that either the rental or income of the property appears; but it seems that the substantial part of it consists of houses, which might make it a more serious question, whether the Court should permit the mortgagor to cut the timber. The supplemental bill, which states the circumstances with respect to the timber, and prays the injunction, contains no case with reference to the insufficiency of value, nor does the plaintiff, by his affidavit, make any such case. The bill and affidavit appear to proceed on the supposition that the

No. 15. — *King v. Smith*, 2 Hare, 244, 245. — Notes.

mortgagor has no right to cut the timber under any circumstances. In the valuation which is attempted to be shown, I am not told the quantity of the land, or the rental: nor can I discover of what class the houses are, or whether they are tenanted or not, or what is the nature of the property generally.

It is stated, on the defendant's affidavits, that he did not cut any of the trees with the intention of injuring the estate, but, on the contrary, he did it in the due and proper course of husbandry and management. What is meant by felling twenty-one large elm trees in due course of husbandry, I cannot comprehend. It is obvious, that the defendant is using language of which he does not know the effect. There being, however, no abstract right on the part of a mortgagee to say that the mortgagor shall not cut timber, I am satisfied that there must be clearer evidence of the value before me, or I cannot grant the injunction.

[* 245] * Let the motion stand over, with liberty to apply. If the defendant proceeds to cut more timber, the plaintiff can then renew his application, and bring before me a case upon which I can adjudicate, and then the costs of this motion will be disposed of. I should be very reluctant to decide it without knowing what is the actual value of the security which has been accepted by the mortgagee, or whether he is really secured or not.

ENGLISH NOTES.

Although equity regards the mortgagor as the actual owner of the property until foreclosure, and accordingly as entitled, so long as he remains in possession, to the rents and profit without account, yet the mortgagor will be restrained from availing himself of such ownership so as to deal with the property in a manner which may deteriorate or prejudicially affect the security according to the maxim that "he who seeks equity must do equity." Thus, a mortgagee of a business, goodwill, and right to use the trade name, has a right to restrain an assignee of the mortgagor from using the name. *Beazley v. Soares* (1882), 22 Ch. D. 660, 52 L. J. Ch. 201, 31 W. R. 887.

An equitable mortgagee may restrain the mortgagor from parting with the legal estate. *London and County Banking Co. v. Lewis* (C. A. 1882), 21 Ch. D. 490.

On this principle equity will prevent waste by the mortgagor and for that purpose will grant an injunction in an action brought by the mortgagee. *Farrant v. Lovell* (1750), 3 Atk. 723. And if the mortgagor commits waste pending an action for foreclosure, he may be

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restrained by injunction, though no injunction was originally prayed. *Goodman v. Kine* (1845), 8 Beav. 379. So also a mortgagee of leaseholds may claim damages for the removal of fixtures whether landlord's or tenants' fixtures by the mortgagor or his trustee in bankruptcy. *Hitchman v. Walton* (1838), 4 M. & W. 409.

But, as laid down in the above Ruling Case, a mortgagee is not entitled to an injunction, against waste as a matter of course, nor, as a general rule, unless the Court is satisfied that the result of the waste will be to render the security insufficient. See *Usborne v. Usborne* (1740), 1 Dick. 75; *Hampton v. Hodges* (1803), 8 Ves. 105; *Humphreys v. Harrison* (1820), 1 Jac. & Walk. 581, 21 R. R. 238.

AMERICAN NOTES.

In some of these States actions of trespass or trover are allowed in case of waste by the mortgagors, but Courts of equity here will always enjoin the mortgagor from committing material waste to an extent injurious to the adequacy of the security, no matter what the theory of the mortgage, whether a conditional sale or a mere pledge. Upon such an application the insolvency or poverty of the mortgagor is a material inquiry. 1 Jones on Mortgages, sect. 684, citing the principal case. All the cases agree in this. *Harris v. Bannon*, 78 Kentucky, 568; *Adams v. Corriston*, 7 Minnesota, 456; *Fairbank v. Cudworth*, 33 Wisconsin, 358; *Dorr v. Dudderar*, 88 Illinois, 107; *Verner v. Betz*, 46 New Jersey Equity, 256; *Coker v. Whitlock*, 54 Alabama, 180; *Robinson v. Russell*, 24 California, 467; *Lavenson v. Standard Soap Co.*, 80 California, 245; 13 Am. St. Rep. 147; *Brady v. Waldron*, 2 Johnson Chancery (N. Y.), 148; *Salmon v. Chagett*, 3 Bland Chancery (Maryland), 125; *Vanderslice v. Knapp*, 20 Kansas, 647; *Knarr v. Conaway*, 42 Indiana, 260 (on protection of surety); *Cooper v. Davis*, 15 Connecticut, 556; *Scott v. Wharton*, 2 Henning & Munford (Virginia), 25; *Guernsey v. Wilson*, 134 Massachusetts, 482 (removal of fixture); *Mut. L. Ins. Co. v. Bigler*, 79 New York, 568; *Walker v. Radford*, 67 Alabama, 446; *Moses v. Johnson*, 88 Alabama, 517; 16 Am. St. Rep. 58; *McCormick v. Hartley*, 107 Indiana, 248; *State Sav. Bk. v. Kercheval*, 65 Missouri, 682; 27 Am. Rep. 310 (removal of building); *Pasco v. Gamble*, 15 Florida, 566; *Hutchins v. King*, 1 Wallace (U. S. Sup. Ct.), 60; *Waterman v. Matteson*, 4 Rhode Island, 539; *Stowell v. Pike*, 2 Maine, 387; *Langdon v. Paul*, 22 Vermont, 208; *Sanders v. Reed*, 12 New Hampshire, 558.

In Arkansas the remedy is to appoint a receiver. *Mooney v. Brinkley*, 17 Arkansas, 340.

This doctrine is so well settled that Chancellor Kent contented himself with saying: "An injunction lies against a mortgagor to stay waste. The Court will not suffer him to prejudice the security." *Brady v. Waldron*, *supra*.

No. 16. — *WHITBREAD v. SMITH*.

(L. C. and L. JJ. 1854.)

RULE.

WHERE by a mortgage the equity of redemption is limited to uses different from those subsisting at the date of the mortgage, the presumption is against any change of ownership or rights for purposes other than those of the particular mortgage.

Whitbread v. Smith.

3 De G. M. & G. 727-741 (s. c. 23 L. J. Ch. 611).

Mortgage. — Limitations of Equity of Redemption. — Presumption against Alteration.

[727] Real estate was settled on A. for life, remainder to his wife for life, remainder to the heirs of the body of the wife, remainder to the right heirs of A. : A. and his wife barred the wife's estate tail ; and by that and other deeds it was settled to such uses as A. should appoint ; A. appointed, by a deed of July, 1817, to such uses as he and his wife should jointly appoint, and in default to himself for life, remainder to his wife for life, remainder to his son in fee. A. and his wife made several mortgages, all except one limiting the equity of redemption upon or consistently with the uses of the deed of 1817. In 1832 they made, under the power in the deed of 1817, another mortgage, which limited the equity of redemption to A. and his wife, "their heirs or assigns, or to such other persons, &c., as they should direct : " and by a deed of even date certain terms were assigned to attend the inheritance according to the uses of the mortgage deed of even date. The wife having died, the husband, claiming to be seised in fee, sold. On a bill filed against the purchaser by parties claiming under the son to redeem : *held*, that the proviso for redemption in the deed of 1832 was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee in the deed of 1817.

A. and his wife, by deed, limited the estate to such uses as A. alone should by deed or will appoint : on the next day, A. by deed poll appointed to such uses, &c., as he and his wife should jointly appoint, with remainder in default of appointment to the son in fee ; and on the day after, by a deed, A. and his wife appointed the estate by way of mortgage : after this last deed had been engrossed, it was considerably altered and interlined, the wife not having been originally made a party to it. *Held*, under the circumstances, that the three deeds must be presumed to have formed but one transaction.

This was an appeal by the plaintiffs from the decision of the Vice-Chancellor KINDERSLEY, made on the hearing of the cause

No. 16. — *Whitbread v. Smith*, 3 De G. M. & G. 727-729.

on the 11th June, 1853. The facts are here restated from the report of the case in the first volume of Mr. Drewry's Reports, p. 531.

The plaintiffs in this case claimed as purchasers under a deed dated the 13th April, 1850, from W. Rees the son of W. Rees, who died in September, 1849. The defendants, M. T. Smith and M'Donald Steele, were the devisees in trust of the will of Thomas Williams; Elizabeth Williams was his executrix, and W. H. Williams his son and beneficial devisee.

By an indenture of the 28th May, 1794, and a fine * then [*728] levied, certain real estate was limited to W. Rees the elder and Mary his wife, and their heirs, until the then intended marriage of their son with Anne Harris, with remainder to the said W. Rees the elder and Mary his wife, for their lives and the life of the survivor; with remainder to Warren Jane for a term of 100 years upon certain trusts which never arose; with remainder to W. Rees the younger for life; with remainder to A. Harris for life; with remainder to the heirs of the body of A. Harris by W. Rees the younger; with remainder to the right heirs of W. Rees the younger. On the 28th April, 1808, W. Rees the elder died, and on the 15th May, 1813, Mary Rees died.

By indenture of the 2nd June, 1815, and a recovery then suffered, the estate tail of A. Harris (then Rees) was barred, and the estate was limited to Baker and Price for a term of 1000 years, upon trust to raise £500, with remainder to W. Rees for life; with remainder to Anne his wife for life; with remainder to Baker and Price and their heirs, during their lives, &c., as trustees to preserve, &c.; with remainder to Gardner and Baker, for a term of 1000 years, to raise £600 for the children of W. Rees by Anne, with remainder to the right heirs of the survivor of W. and A. Rees; and this indenture contained a reservation of powers of revocation and new appointment in Rees and his wife.

On 27th March, 1815, Baker and Price, as trustees of the first term of 1000 years, mortgaged to one Howell to secure £400.

By indenture of 30th June, 1817, Rees and his wife revoked the uses in the deed of the 2nd January, 1815, save as to the first term of 1000 years, and the estate was thereby limited subject to the said term to such uses, * &c., as W. Rees [*729] alone should by deed or will appoint. On the next day, 1st July, 1817, W. Rees by deed poll appointed the estate to such

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uses, &c., as he and his wife should jointly appoint, and in default of appointment to himself for life, with remainder to his wife for life; with remainder to his son W. Rees in fee charged with £600. On the 2nd July, 1817, W. Rees and his wife appointed the estate to Matthews by way of mortgage for a term of 700 years to secure £250, and provision was thereby made for cesser of the term on repayment of the money.

On the 27th August, 1817, Howell's mortgage was assigned to one Richards, and W. Rees and his wife appointed the estate to him by way of further mortgage for a term of 800 years to secure in all £600; this deed also provided for cesser of the term on repayment being made.

On the 10th July, 1818, Matthews assigned his mortgage to Waters. On the 29th July, 1818, Richards and Waters assigned their mortgage to Jenkins, and W. Rees and his wife appointed the estate to him to secure altogether £1000; the proviso for reconveyance was "unto such persons for such estates and in such manner as the said W. Rees and Anne his wife should appoint, and in default of appointment to attend the inheritance." On the 22nd September, 1820, Jenkins' mortgage was assigned to Morgan, and W. Rees and his wife appointed the estate to Morgan, in fee to secure in addition £140; the proviso for reconveyance in this deed was "to W. Rees and Anne his wife, their heirs or assigns, or to the use of such person or persons for such estate or estates, &c., as they should jointly appoint, &c., and in default thereof to such uses as were limited by the deed poll of 1st July, 1817."

[*730] * On the 4th March, 1824, Rees and his wife appointed the estate by way of mortgage to Mostyn, with a proviso for reconveyance unto and to the use of W. Rees and Anne his wife, their heirs, appointees, and assigns, or as he or they should direct.

On the 23rd November, 1826, Morgan and Mostyn's mortgages were assigned to Anne Phillips, and Rees and his wife further charged the estates, making £1350 the total then due; this deed provided for reconveyance unto "W. Rees and Anne his wife, to, for, and upon such uses, and subject to such power of appointment and other powers as are declared of and concerning the same by the deed poll of 1st July, 1817." On the 23rd November, 1826, the estate was further mortgaged by Rees and his wife to Protheroe and Phillips, to secure £150 17s. 6d.; this deed provided for

reconveyance unto the said W. Rees and Anne his wife, upon the uses and trusts declared by the said deed poll of the 1st July, 1817.

On the 7th May, 1832, the premises were appointed in fee by Rees and his wife to Walker Gray, to secure (including A. Phillips and Protheroe and Phillips' mortgages thereby assigned) £1450; and it was thereby provided that on repayment of the mortgage money the estate should be reconveyed "unto and to the use of the said W. Rees and Anne his wife, their heirs or assigns, or unto such other person or persons, &c., as they should direct." And a power of sale was thereby given to Gray, the surplus purchase-money being made payable to W. Rees and Anne his wife, their heirs, executors, administrators, and assigns, or as they should direct. On the following day a further charge of £150 in favour of Gray was created by Rees and his wife.

* Anne Rees died on the 6th September, 1841. [* 731]

On the 19th July, 1842, W. Rees further mortgaged the estate in fee to Martin, to secure (including Gray's mortgage thereby assigned) £1800; this deed provided for reconveyance "unto and to the use of the said W. Rees, his heirs or assigns, or as he or they should direct." Martin, on the 22nd of February, 1843, assigned to Colvin; and on the 5th November, 1845, Rees and Colvin, in pursuance of the contract for sale, conveyed for £1900, out of which Colvin's mortgage was paid off to Mr. Williams, the testator of the defendants Smith and Steele. W. Rees died in September, 1849, leaving his son W. Rees the younger surviving, who conceiving that he was entitled under the deed of 1817, conveyed to a trustee for the plaintiffs; and the bill was filed by them to redeem as against the representatives of Williams, treating the conveyance of 1845 as merely a security for the mortgage money charged on the estate.

A statement of account between Rees the vendor and Williams the purchaser, with reference to the purchase-money agreed to be paid, was set out in the bill, and admitted to be correct in the answer; and with respect to one item of £145, part of such purchase-money, there appeared the following explanatory entry: "By abatement of purchase-money as agreed, it having been discovered after the signing of the contract that there had been a settlement of the estate, and that it was probable, if not certain, that Mr. Rees had only a life interest in the property, — £145."

 No. 16. — *Whitbread v. Smith*, 3 De G. M. & G. 731-733.

The VICE-CHANCELLOR having dismissed the bill with costs the plaintiffs now appealed, and the cause came on to be reheard before the LORD CHANCELLOR and the Lords Justices.

[*732] *Mr. Glasse and Mr. Whitbread, for the plaintiffs, in support of the appeal. The VICE-CHANCELLOR has miscarried in holding that the parties to the mortgage deed of 1832 intended thereby to alter the devolution of the property to other uses than those to which it stood limited previously to the execution of that deed. It is clearly established that the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title; the rule in mortgage transactions being that the equity of redemption remains subject to the old uses, unless there is a clear manifestation of intention to do something more than to make a mere mortgage. *Ruscombe v. Hare*, 6 Dow. 1 (19 R. R. 1); *Wood v. Wood*, 7 Beav. 183; *Hipkin v. Wilson*, 3 De G. & Sm. 738; *Plowden v. Hyde*, 2 De G. M. & G. 684; *Clark v. Burgh*, 2 Coll. 221. The main authority on which the VICE-CHANCELLOR relied was that of *Anson v. Lee*, 4 Sim. 364 (33 R. R. 122), but the soundness of that decision has been seriously impugned. Lord ST. LEONARDS says, with reference to it: "It seems difficult to maintain the decision, and it does not appear to be supported by the authorities." 1 Sugd. Powers, 364, ed. 6. In the case of *Jackson v. Innes*, 1 Bligh. 104 (20 R. R. 45), the ground of the decision was that it was not merely a mortgage, but that there was apparent, on the face of the deed, a declaration of intention to make a new settlement; but even in that case, when it originally came before Lord ELDON in the Court of Chancery (16 Ves. 356), he thought that there was not a sufficient manifestation of intention to control the legal presumption. The VICE-CHANCELLOR also relied on the authority of *Barnett v. Wilson*, 2 Y. & C. C. C. 407, though that case is clearly distinguishable.

[*733] *Mr. T. Edwards (*amicus curiæ*) referred to the report, in the 17th volume of the Jurist, p. 331, of *Eddleston v. Collins* (3 De G. M. & G. 1).

Mr. Campbell and Mr. R. R. Hawkins, in support of the VICE-CHANCELLOR's judgment. It must be assumed that W. Rees and his wife, the mortgagors, had read and understood the purport and effect of the several deeds which they executed, and which, upon this record, must be so interpreted. *Barnett v. Wilson*. By the deed of the 30th of June, 1817, the estate was limited to such uses

as W. Rees alone should by deed or will appoint; but by the deed poll of the 1st of July, 1817, W. Rees altered the limitation and appointed the estate to such uses as W. Rees and his wife should jointly appoint, and in default of appointment to the son in fee.

[Lord Justice KNIGHT BRUCE. — According to your statement, all the intermediate conveyances were purely voluntary, and the defendants are the representatives of a purchaser for value. How can the plaintiffs set up a claim against them?]

We submit that they cannot; and the fact that the deed of the 1st of July, 1817, was voluntary, forms one ground of the defence as pleaded in the answer. The plaintiffs have no equity to impeach the deed of June, 1817, for the son was not in the position of the wife in the case of *Ruscombe v. Hare*; nor in that of the son in *Hipkin v. Wilson*; he was in no better position than the heir in *Anson v. Lee*; and although that authority has undoubtedly been observed upon by Lord ST. LEONARDS, yet it has never been distinctly overruled; it certainly is not obnoxious to the charge of *establishing a new rule; *Fauconberge v. [*734] Fitzgerald*, Fitzgibbon, 207; s. c. 6 Bro. P. C. 295, Tom. ed.; *Broad v. Broad*, 2 Ch. Ca. 98; *Jackson v. Innes*, 1 Bligh. 104 (20 R. R. 45); *Rowell v. Walley*, Rep. in Ch. 116; *Reere v. Hicks*, 2 Sim. & St. 403 (25 R. R. 241). Assuming, however, for a moment, that the three deeds of June and July, 1817, formed but one transaction, still we submit that there was such clear manifestation of intention to make a new settlement by the deed of 1832, as to bring this case within the authority of *Jackson v. Innes*. Here, that intention was plainly manifested by the fact, that under the deed of further charge of 1842, the wife did not join, as in execution of the joint power in the deed of 1817, which, if then in force, she would have done; it is also to be observed that the ultimate reversion under the deed of 1832 is the same as that under the settlement in 1815; and that, although in the transaction of 1832, both the mortgagors and the mortgagee and their legal advisers must have had before them the abstract of title under the previous instruments, yet that, notwithstanding this, the limitation of the fee was deliberately altered.

Mr. Glasse, in reply.

It is clear that the deed of the 1st of July was not voluntary; the three deeds were in fact executed on the same day, and the

wife refusing to execute the first or third unless her rights were secured under the second, the inference that they formed but one transaction is irresistible. *Ford v. Stuart*, 15 Beav. 493.

[The Lord Justice KNIGHT BRUCE referred to the statement of account set forth in the bill, and admitted in the answer, from which it appeared that Williams had bought the estate with a doubt that W. Rees had only a life interest in the [* 735] property, and asked how, under such * circumstances, the representatives of Williams could claim the fee as purchasers for value.]

The LORD CHANCELLOR.

The plaintiffs in this suit have filed their bill for the redemption of a mortgage in fee of an estate called the New Inn Estate. The Vice-Chancellor KINDERSLEY thought that no title to redeem was made out, and the bill was accordingly dismissed. We are of opinion that the view taken by the VICE-CHANCELLOR is not that which we feel ourselves called upon to take. Arriving as we do at a different conclusion, we should probably, in deference to that learned Judge, have taken time before pronouncing our judgment, but that we have had an opportunity of fully considering the matter during the argument.

The estate was settled, in 1815, subject to a term, on W. Rees for life, with remainder to Anne his wife for life, with remainder, subject to a term for raising portions, to the right heirs of the survivor of William and Anne Rees, and this settlement contained a reservation of a joint power of revocation in the husband and wife. In 1817 the joint power was exercised, and certain mortgages were executed by William and Anne Rees, who went on from time to time increasing the amount borrowed by driblets up to and until the mortgage of 1826. It was not contended that up to that time the limitation of the equity of redemption was altered. But in 1832 the mortgage-deed was executed whereby the limitation of the equity of redemption was altered; and it was argued that although up to that time the devolution of the fee would not have been different, yet that it was altered by that deed.

The husband W. Rees having survived his wife, the defendants claim under him, whereas the plaintiffs claim [* 736] * under W. Rees the son. It may be said, how can the claim of the latter be supported, for the ultimate trust in the settlement of 1815 was not to the son nominatim, but to the

heir of the survivor of William and Anne Rees. The settlement of 1815 was put an end to by the deed of the 30th June, 1817; by that deed the husband and wife concurred in resettling the property to such uses as the husband alone should appoint; this made him absolute owner; but on the next day that state of circumstances was altered, for, by the deed poll of the 1st July, 1817, the husband appointed the estate to such uses as he and his wife should jointly appoint, and in default of appointment to himself for life, with remainder to his wife for life, with remainder, not as under the settlement of 1815, to the heir of the survivor, but to his son William Rees in fee, charged with £600. In the events which have happened that limitation is the same in effect as that under the deed of 1815.

It was under and subject to the settlement of the 1st July, 1817, that the mortgage of 1832 took place. The VICE-CHANCELLOR thought that the provision in that mortgage-deed altered the destination of the equity of redemption; and the grounds on which he proceeded were, that the proviso for redemption was not couched in the same language as in the previous mortgage-deeds, but in such words as forced him to the conclusion that there was a different intention with reference to the destination of the fee: in that respect we are unable to concur with him. The proviso for redemption is, that on repayment of the mortgage-money the estate should be reconveyed "unto and to the use of the said W. Rees and Anne his wife, their heirs or assigns, or unto such other person or persons, &c., as they should direct:" that is not the course of descent which the estate would have taken if there had

* been no such proviso. With all deference to the VICE- [* 737] CHANCELLOR, I cannot arrive at the conclusion that the form of the proviso indicates any intention of altering the limitation of the estate which had previously existed.

The rule of law, on which we are quite agreed with the VICE-CHANCELLOR, is, as stated by him in his judgment in this case (1 Drewry, 531, see p. 544), "that if husband and wife concur in mortgaging the wife's estate, or an estate in which she has any interest, whether it be a right of dower or an interest in remainder or otherwise, *primâ facie* in the absence of evidence to the contrary the wife is considered as having joined merely to secure the mortgage, and the terms on which the equity of redemption is limited will not affect her right" . . . and "that it is equally well estab-

No. 16. — *Whitbread v. Smith*, 3 De G. M. & G. 737, 738.

lished that if there is sufficient indication of an intention to vary the limitation of the equity of redemption, that intention will be carried out." But when a mortgage is executed, the intention *primâ facie* is, that it is a mortgage and a mortgage only; and it is not on slight expressions in the proviso for redemption that this Court will infer any contrary intention. Where there has been a different construction there have been special circumstances, independently of the proviso for redemption, to take it out of the rule; and that is proved by the case of *Jackson v. Innes*, 1 Bligh. 104 (20 R. R. 45), which is one of those cases where, on appeal, Lord ELDON altered his own decision in the Court below. When that case came before the House of Lords, Lord REDESDALE pointed out that the mortgage was one for a term of years, and when discharged, the term being at an end, the operation of the deed, so far as it declared the limitation of the estate subject to the term, remained perfectly distinct. Lord ELDON, in the Court below, had [*738] held that the course of descent was not altered; he *admitted, however, in the House of Lords, that he had not rightly apprehended the case when it was originally before him; and upon that occasion Lord REDESDALE explained that the operation of the deed as to the mortgage term and the operation of the deed as to the limitation of the fee were wholly distinct, and did not in any way depend on each other: he observed that the question did not arise upon the interpretation of the proviso for redemption, but inasmuch as the reversion dependent upon the term was expressly limited to the right heir of the survivor of the husband and wife, he thought that though the mere form of the proviso for redemption alone would not have altered the course of descent, yet that, the reversion being limited to different parties, the rules which had been established in cases of resulting trusts did not apply, and that it would be a strange presumption to infer that the right to redeem should be in another course. *Expressum facit cessare tacitum*.

The case of *Recre v. Hicks*, 2 Sim. & St. 403 (25 R. R. 241), and many other authorities, in which a similar intention has been inferred, rest on the same clear principle. The question to be decided upon each case is more one of fact than of law; for in each it is to be discovered whether or not there is a sufficient indication of an intention to vary the previously existing limitations. The decision in the case of *Plowden v. Hyde*, 2 De G. M.

& G. 684, appears, though it is not exactly in point, to have been governed by the same principle. But I am unable to find anything in this transaction from which I can infer that these parties intended to alter the course of descent. It is absurd to suppose that in borrowing the small sums of money in driblets as they did they ever for a moment contemplated a change in the ultimate destination of the *property. In my opinion they [* 739] meant nothing more than that there should be a power of redemption in those persons who would have been lawfully entitled to redeem.

Another point was made in this case, which for some time made an impression on my mind; I allude to the point suggested by the Lord Justice KNIGHT BRUCE. The suggestion was, that the settlement of the 1st July, 1817, might not have been made for valuable consideration; that by the deed of the 30th June, 1817, W. Rees had become the absolute owner of the estate, and that the deed of the 1st July was voluntary, and therefore void as against the defendants claiming as purchasers for value: that would have been a fatal objection if established, but in my opinion it is clear to demonstration on the face of the three deeds of June and July, 1817, that W. Rees the son was not a volunteer but was a purchaser for value. Although *primâ facie* he was a volunteer, yet when the three deeds are strictly looked at it is manifest that they formed but one transaction; that although, for *punctum temporis*, W. Rees the father might appear to have been the absolute owner, yet that Anne Rees the mother, who before the deed of the 30th June, 1817, had a joint power of revocation with him, refused to concur in raising more money upon any other terms than that the estate should be resettled in conformity with her wishes upon her son. How is that made out? The effect of the deed of the 30th June, 1817, was to vest the estate in the husband in fee. The very next day he resettled it by appointment to such uses as he and his wife should jointly appoint, and in default of appointment the ultimate remainder was to the son in fee; and on the day after, namely, on the 2nd July, the husband and wife executed their joint power by mortgaging the estate for a term of years. There is also this peculiarity * in looking at these [* 740] deeds, — that the mortgage deed of the 2nd July is altered and interlined in many more respects than is ordinarily the case in such instruments: if it had been in conformity with the first

deed of the 30th June none of these alterations and interlineations would have appeared, and although there are these alterations in the deed of 2nd July there is no alteration in that of the 30th June. It is also to be observed that the intermediate deed of the 1st July, whereby W. Rees resettled the estate giving a joint power of appointment to himself and his wife is hurriedly prepared, and is executed on a mere piece of paper. The wife may very naturally have said to her husband, "I will not assist you in borrowing money unless you consent to make a provision for our son." The deeds of the 30th June and 2nd July being both already engrossed, it would have been expensive to have had new deeds; the parties accordingly had recourse to the expedient of framing the intermediate deed on the piece of paper which they got duly stamped, and then they altered the deed of the 2nd July as they desired. That being so, I come to the irresistible conclusion that these three deeds formed all one transaction. I do not know whether I should not have come to the same conclusion even if these facts did not appear, but under the circumstances and for the reasons I have already stated, I am clearly of opinion that W. Rees the son was not a volunteer, and therefore that the bill ought not to have been dismissed. The defendants must pay so much of the costs as has been occasioned by their disputing the title to redeem.

The Lords Justices concurred, the Lord Justice KNIGHT BRUCE observing, with reference to the case of *Barnett v. Wilson*, 2 Y.

& C. C. 407, that whether that case had been correctly [*741] or incorrectly decided it was perfectly consistent *with the decision pronounced on the present appeal.

The registrar having prepared the minutes of the order as in a common redemption suit where the mortgagee has been in possession, the cause was at the instance of the defendants directed to be set down to be spoken to upon the minutes.

It was then contended upon behalf of the defendants, that as their testator (Williams) had become under the conveyance of 1845 the purchaser of at least the life estate of William Rees they were not during the existence of that estate liable to account as mortgagees in possession. And it was so decided by their Lordships.

It was further contended on behalf of the defendants, that the life estates of William Rees and Anne his wife being preceded by an absolute power of appointment, by the exercise of which they

might have made the estate their own and defeated the remainder-man, they were not to be treated as mere tenants for life; but that any interest which had fallen into arrear during their joint lives and had been paid off by Williams, ought to be allowed to be a charge upon the inheritance, on the same principle that an adult tenant in tail is not bound to keep down the interest because he can make the estate his own and "the remainder-man is at his mercy." See *Burges v. Mawbey*, T. & R. 167; pp. 175, 176 (24 R. R. 9). They submitted that the decree in this respect should be similar to that in *Ruscombe v. Hare*, 2 Bligh. (N. S.) 192, but their Lordships held that William Rees was a mere tenant for life, and therefore bound to keep down the interest, and that the arrears paid by Williams could not be charged upon the inheritance.

ENGLISH NOTES.

The rule laid down in the above case is well settled that in the absence of evidence of contrary intention the right of redemption will remain in the original owner, though the equity of redemption is limited to other persons. *Hipkin v. Wilson* (1850), 3 De G. & Sm. 738; 19 L. J. Ch. 305, 14 Jur. 1126.

But the mortgage deed itself may so clearly express a contrary intention that the Court would be bound to give effect to it. See Sug. H. L. 174. The intention so expressed must however be clear and unmistakable. *Lord Hastings v. Astley* (1861), 30 Beav. 260.

Even though the mortgage deed itself contains no express declaration of intention to change ownership of the property, the presumption against alteration of the previous rights may be rebutted if the special circumstances of the case afford sufficient evidence of intention. *Heather v. O'Neil* (1858), 2 De G. & J. 399, 414.

This rule will apply where a mortgage is made under a power of appointment; and therefore in the case of an execution of a special power by way of mortgage the right of redemption will remain in the persons entitled to the estate in default of appointment. *Innes v. Jackson* (1809), 16 Ves. 356, 10 R. R. 190. If a mortgage is made under a general power the equity of redemption is apparently in the appointor. *Re Van Hagan* (C. A. 1880), 16 Ch. D. 18, 50 L. J. Ch. 1, 44 L. T. 161, 29 W. R. 84.

The principle of the rule applies in cases where money is borrowed by a husband and wife upon the security of the wife's estate. In such cases although the equity of redemption is by the mortgage deed reserved to the husband and his heirs there will be an implied trust for the wife and her heirs. So that the wife or her heirs shall redeem and

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not the husband or his heirs. See *Huntington v. Huntington* (1702), No. 28, p. 193, *post*: *Ruscombe v. Hare* (H. L. 1828), 2 Bligh. (N. S.) 122.

The rule will apply to the mortgage of a wife's chattel real. *Clark v. Burgh* (1845), 2 Coll. 231; *Pigott v. Pigott* (1867), L. R. 4 Eq. 549, 37 L. J. Ch. 116, 16 L. T. 766.

It would seem however that slighter evidence of contrary intention would be sufficient in such a case. *Watts v. Thomas* (1726), 2 P. Wms. 365.

No. 17. — BROWN v. COLE.

(CH. 1845.)

RULE.

A MORTGAGE is not redeemable before the day thereby fixed for payment of the mortgage moneys, though the full amount of principal and interest up to that day be offered to the mortgagee.

Brown v. Cole.

14 Simon, 427-428 (s. c. 14 L. J. Ch. 167; 9 Jur. 290).

[427] *Mortgagor and Mortgagee. — Redemption.*

A bill to redeem a mortgage, filed before the mortgage has become absolute at law, is demurrable, notwithstanding the mortgagor may have tendered to the mortgagee, the principal money, together with interest up to the day named in the proviso for redemption.

Bill to redeem a mortgage for a term of years, made on the 1st of April, 1844.

The proviso for redemption stipulated that the mortgagee should re-assign the mortgaged premises, on being repaid the money lent, on the 1st of April, 1845, with interest in the meantime, by quarterly payments.

The mortgagor, having had an advantageous offer, for the purchase of the premises shortly after the mortgage was made, tendered to the mortgagee, the amount of the principal, and of the interest up to the 1st of April, 1845, together with a re-assignment of the mortgaged premises; but the mortgagee would neither accept the money nor execute the deed: in consequence of which the bill was filed.

The defendant demurred to the bill for want of equity.

The VICE-CHANCELLOR (SHADWELL) allowed the de- [428] murrer, on the ground that it was contrary to the practice of the Court to decree the redemption of a mortgage, before the day appointed for that purpose had arrived.

ENGLISH NOTES.

In mortgage deeds the covenant for payment and the proviso for redemption generally fix a day at the end of six months from the date of the deed as the time for payment of the principal and interest, before which the mortgagee cannot call in his money, nor can the mortgagor generally compel the mortgagee to accept it and reconvey the property; but any other time may be appointed. *Dav. Conv.* vol. II. pt. II. p. 513.

Where a mortgagee enters into possession before the day fixed by the proviso for redemption the general rule that the mortgagor cannot redeem before the day is excluded. *Bovill v. Endle*, 1896. 1 Ch. 648. 65 L. J. Ch. 542. 44 W. R. 523.

Sometimes, a mortgage contains a proviso for redemption on payment at the end of six months, qualified by a further proviso that if the interest shall in the meantime be regularly and punctually paid, the mortgagee shall not call in the principal before a more distant date. See *Seaton v. Twyford* (1870), L. R. 11 Eq. 591, 40 L. J. Ch. 122, 23 L. T. 648, 19 W. R. 200.

If the proviso against calling in the money is unconditional it will be enforced, though the interest falls into arrear. *Burrowes v. Molloy* (1845), 2 J. & L. 521.

But if an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, without referring to punctual payment of interest, the Court, in settling the mortgage, will make the postponement conditional on punctual payment of interest, and in the case of a mortgage of leaseholds, on performance by the mortgagor of the lessee's covenants. *Seaton v. Twyford* (1870), L. R. 11 Eq. 591, 40 L. J. Ch. 122, 23 L. T. 648, 19 W. R. 200.

Notwithstanding the general rule against fettering the right of redemption (see p. 119, *et seq. post*), yet where a mortgage deed contains a proviso that the principal shall not be called in for a certain time, a corresponding covenant will be upheld to the effect that the mortgagor shall not compel the mortgagee to accept payment of the principal before that time. *In re Hone's Estate* (1873), Ir. R. 8 Eq. 65.

Even in the absence of such a covenant, the Court will not allow the mortgagor to redeem before the time when the mortgagee can call in

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the principal, unless the time so fixed is so distant as to render the postponement of the right to redeem oppressive to the mortgagor. *Cowdry v. Day* (1859), 1 Giff. 316, 29 L. J. Ch. 39; see *Brown v. Cole*, *supra*.

Where a proviso postponing the mortgagee's right to call in the principal is conditional on punctual payment of interest, there is no relief in equity against the consequences of default, if the interest falls into arrear for a few days only. *Hicks v. Gardner* (1837), 1 Jur. 541; *Leeds and Hanley Theatre of Varieties v. Broadbent* (C. A.) 1898, 1 Ch. 343, 67 L. J. Ch. 135.

If the interest falls into arrear, the acceptance thereof by the mortgagee is no waiver on his part of his right to call in the principal. *Keene v. Biscoe* (1878), L. R. 8 Ch. D. 201, 47 L. J. Ch. 644.

If the mortgagor becomes bankrupt, a proviso in the mortgage deed postponing the mortgagee's right to call in the principal will not prevent the latter from obtaining an order for sale, though the fixed time has not arrived. *Ex parte Bignold* (1838), 3 Deac. 151.

AMERICAN NOTES.

This case is cited in 2 Jones on Mortgages, sect. 1052, and is supported by *Abbe v. Goodwin*, 7 Connecticut, 377, distinguishing *Talbot v. Bradill*, 1 Vern. 183, and observing: "In other words it is to substitute another contract for that which the parties have entered into. It will be in vain to search for authorities to that effect. None are shown. It is opposed to the whole doctrine of contracts." To the same effect, *Moore v. Cord*, 14 Wisconsin, 213, where the Court said, *obiter*: "Nor do we think the complaint can be sustained as a bill to redeem. It appears on the face of it that the mortgage debt was not all due at the time the suit was commenced, though the full amount of principal and interest up to the time when it was to become due, had been tendered. The question then is, whether the owner of the equity of redemption can, before a mortgage debt is due, tender the whole amount to become due, and then commence an action to compel the mortgagee to take the money and discharge the mortgage. This is a question somewhat novel in its character, and one upon which authorities are not numerous, owing doubtless to the rarity of the occurrence as a matter of fact. It is seldom, at least in modern times, that the debtor offers to pay before his debt is due, including interest up to the time when it is to become due; still more seldom, such offer being made, that the creditor refuses it. There are the several cases which have held that a tender before the day of payment fixed by the contract is not good. *Tilton v. Britton*, 4 Halstead, 127; *Kingman v. Pierce*, 17 Massachusetts, 247; *Saunders v. Frost*, 5 Pick. 267. The last two cases seem to rest the decision upon the right of the creditor to keep his money at interest, according to the contract. But where the debtor tenders the whole amount of the interest which could accrue up to the time of payment fixed by the contract, as was done in this case, this reason would seem to fail. But can it not be said that

No. 18. — *Smith v. Smith*, 1891, 3 Ch. 550. — Rule.

the creditor may have an interest in keeping his money invested, upon security, rather than to have it in his own hands? Can it not be said that he may insist on it even arbitrarily or obstinately and without advantage to himself, so long as the contract provides for? It would seem so, unless the rule of the civil law is to prevail, which was that the day of payment was fixed for the convenience of the debtor only, that he might not be compelled to pay before that time, leaving him at liberty, however, to do so if he chose. There seems to be only one case which has so held. *McHard v. Whitcroft*, 3 Har. & McH. 85. In that no opinion is given by the Court, but the counsel who argued that side of the question, claimed that they were governed by the rule of the civil law, and admitted that the common law was different."

"We do not, however, deem it necessary to decide this question."

No. 18. — *SMITH v. SMITH*.

(CH. D. 1891.)

RULE.

As a general rule a mortgagor must, after default in payment on the day fixed, give to the mortgagee six months' notice of his intention to pay off the mortgage, or six months' interest in lieu of notice.

Smith v. Smith.

1891, 3 Ch. 550-553 (S. C. 60 L. J. Ch. 694; 45 L. T. 334; 40 W. R. 32).

Mortgage. — Payment off. — Notice. — Interest. — Mortgage of Reversion. [550]

A mortgage was made of the mortgagor's interest in a fund in Court subject to a prior life interest. The fund was assigned by the mortgage deed to the mortgagee "to have, receive, and take the same," subject to the life interest and to the proviso for redemption. After the time appointed for redemption had expired the tenant for life died, and the trustee of a settlement of the fund made by the mortgagor presented a petition for the application of the fund in payment of the mortgagee, and payment of the residue to the persons entitled thereto. The mortgagee had not demanded payment of the debt, or taken any steps to compel payment: —

Held, that, notwithstanding the nature of the mortgaged property and the form of the mortgage deed, the mortgagee was entitled to six months' interest from the date of the service of the petition on him.

Petition for the distribution of a fund in Court in this suit.

The suit was commenced in the Court of Chancery on the 16th of March, 1842, for the execution of the trusts of the will of

No. 18. — Smith v. Smith, 1891, 3 Ch. 550, 551.

William Smith, who died on the 25th of February, 1840. On the 12th of June, 1851, a decree for the execution of the trusts was made. A sum of £20,000 Consols was transferred into Court in the suit to answer an annuity of £600 which was bequeathed by the testator to his wife for her life. Subject to her life interest the fund was given by the testator to his son, J. G. Smith. On the 13th of March, 1861, J. G. Smith assigned the £20,000 Consols (subject to his mother's life interest) to William Froom by way of mortgage to secure the repayment with interest of £5000 advanced to him by Froom. The mortgage contained a power of sale. On the 15th of June, 1861, J. G. Smith made a settlement of the £20,000 Consols (subject to his mother's life interest and to the mortgage) for the benefit of his wife and children. On the 30th of October, 1865, the executors of William Froom (who was then dead), with the concurrence of J. G. Smith and of the trustee of the settlement, assigned the mortgage debt of £5000 and interest to Harriett Dawkins and Emma Dawkins, as tenants [*551] * in common. And the sum of £20,000 Consols and the dividends to accrue due thereon were thereby assigned to them (subject to the life interest of the testator's widow therein); "to have, receive, and take" the same unto them as tenants in common, subject to the proviso for redemption and reassignment thereafter contained.

By this deed of transfer a new power of sale was given to the mortgagees in default of payment of the principal and interest. And it was thereby agreed and declared that the mortgagees should stand and be possessed of the moneys arising from any sales or sale, upon trust, in the first place, to pay the costs, charges, and expenses attending the sale, or in obtaining payment of the mortgage money, and, in the next place, to retain and pay the principal sum of £5000 thereby secured and interest thereon, and upon trust to pay the residue of the moneys unto the mortgagors. On the 29th of April, 1871, the mortgage was transferred by the Misses Dawkins to Alexander Martin. J. G. Smith was a party to the transfer. J. G. Smith died on the 25th of July, 1887. Martin died on the 26th of April, 1891. The testator's widow died on the 5th of June, 1891.

The petition was presented by the trustee of the settlement of the 15th of June, 1861, and it asked that out of the £20,000 Consols the mortgage debt of £5000 might be paid, and that

various other payments might be made, and the residue of the fund transferred to the petitioner. The only question was, whether the executors of Martin, as mortgagees, were entitled to six months' interest in lieu of notice to pay off the mortgage. They had not made any demand for payment of the mortgage debt, or taken any other steps to obtain payment. The petition was served on them.

Oswald, for the petitioner: —

No doubt the general rule of practice is that, after the time fixed for redemption has expired, a mortgagee is entitled to six months' notice of the intention of the mortgagor to pay him off, or to six months' interest in lieu of notice. But to that rule there are some exceptions. It does not apply to a mortgage of a reversionary interest framed as this deed is. By the terms * of [* 552] the deed the mortgagee is "to receive and take" the fund when the reversion falls into possession, and out of it to retain what is due to him on his security. He is, therefore, not entitled to notice or to interest in lieu of notice. The falling in of the reversion depended, not on the act of the mortgagor, but on the happening of an uncertain event. If the fund had not been in Court the mortgagee would have paid himself when the reversion fell into possession. In such a case the ordinary rule does not apply. *Letts v. Hutchins*, L. R. 13 Eq. 176; *Fisher on Mortgage*, 4th ed. pp. 734, 735. Mr. Fisher there says that the rule "seems to be inapplicable where the security is naturally discharged by an event which does not depend upon the will of the debtor, as by the falling in of a policy of insurance, which constitutes the security, for it may be considered as part of the arrangement that the debt, if not sooner discharged, shall be paid upon the happening of that event." N. L. MacSwinney, for the executors of the mortgagee, was not heard.

Ribton, Bramwell Davis, and E. A. Jennings, for other parties.

ROMER, J. : —

It seems to be a settled rule of practice that, after default has been made by a mortgagor in payment of the principal and interest in accordance with the proviso for redemption contained in the mortgage deed, he must either give the mortgagee six calendar months' notice of his intention to pay off the mortgage, or must pay the mortgagee six months' interest in lieu of notice. This is the well-settled general rule. But no doubt the rule is subject to

some exceptions. If the mortgagee has himself demanded payment of the debt, or has taken any steps to compel payment of it, no notice by the mortgagor, and no payment of interest in lieu of notice, is required. I think that in *Letts v. Hutchins*, the mortgagee had taken steps to compel payment of the debt, and I believe that was the true ground of the judgment, though Vice-Chancellor

WICKENS did not state his reasons. I am not aware of any [~ 553] exception to the rule arising *out of the nature of the mortgaged property, and I will not be the first Judge to introduce such an exception. I shall adhere to the rule; and, inasmuch as in the present case the mortgagee has not demanded payment of his debt or taken any steps to compel payment, I am of opinion that he is entitled to six months' notice, or interest in lieu of notice. The interest will run from the date of the service of the petition on the mortgagee. If the mortgagee of a reversionary interest were to apply for and obtain payment of his debt when the reversion fell into possession, in such a case it may well be that he would not be entitled to any interest, because it might be said that he had taken steps to compel payment of his debt. But that is not the present case.

ENGLISH NOTES.

The principle on which this Rule is founded appears to be that, according to the well-known maxim that "he who seeks equity must do equity," a mortgagor whose estate is forfeited at law and who is only entitled to redeem in equity, must do that which is equitable by allowing the mortgagee to have a reasonable opportunity to find a new security for his money. *Browne v. Lockhart* (1840), 10 Sim. 420 at p. 424.

A mortgagor may, however, redeem the mortgage at once without notice, if he is willing to pay six months' interest in advance, in lieu of notice. *Hutton v. Brown* (1881), W. N. 116, 45 L. T. 343, 29 W. R. 928; *Johnson v. Evans* (1889), W. N. 95, 61 L. T. 18.

The Rule above stated applies to all mortgages by deed with a proviso for redemption, in the ordinary form, and also to securities by way of conveyance on trust for sale without any proviso for redemption. See *Bell v. Carter* (1853), 17 Beav. 11, 22 L. J. Ch. 933, 17 Jur. 478.

But the Rule does not apply to equitable mortgages by deposit of title deeds with or without an accompanying memorandum, inasmuch as such securities are presumed to be of a merely temporary nature. *Fitzgerald's Trustee v. Mellersh*, 1892, 1 Ch. 385, 61 L. J. Ch. 231, 66 L. T. 178, 40 W. R. 251.

No. 19. — *Keech v. Hall*, Dougl. 21. — Rule.

If a mortgagee demands payment, or takes any steps to compel payment or enforce his security, he will not be entitled to six months notice or interest in lieu thereof. *Letts v. Hutchins* (1871), L. R. 13 Eq. 176; *Bocill v. Endle*, 1896, 1 Ch. 648, 65 L. J. Ch. 542, 44 W. R. 523.

A mortgagee who has by his conduct waived his right to notice cannot claim interest in lieu of notice. *Banner v. Berridge* (1881), 18 Ch. D. 254, 50 L. J. Ch. 630, 44 L. T. 680, 29 W. R. 844.

Consent to a sale in an administration action is equivalent to six months' notice. *Day v. Day* (1862), 31 Beav. 270, 31 L. J. Ch. 806, 8 Jur. (N. S.) 1166, 7 L. T. (N. S.) 122, 10 W. R. 728.

A mortgagee who comes in and approves his debt in a cause must take his money without notice and join in the conveyance. *Matson v. Swift* (1841), 5 Jur. 645.

Where a railway company purchases land compulsorily, a mortgagee can insist on six months' interest in lieu of notice. *Spencer-Bell v. London & South Western Railway Co.* (1885), 33 W. R. 771.

Where the money is not paid on the expiration of a notice to redeem, the mortgagee may generally require a further six months' notice or interest in lieu thereof. *Re Moss, Levy v. Sewill* (1885), 31 Ch. D. 90, 55 L. J. Ch. 87, 54 L. T. 49, 34 W. R. 59.

A mortgagor who has given notice of his intention to pay off a mortgage must, in order to exclude the mortgagee's right to a further notice or interest in lieu thereof, make on the appointed day a strict tender of the moneys due. *Garforth v. Bradley* (1755), 2 Ves. Sen. 678.

No. 19. — KEECH *v.* HALL.

(K. B. 1778.)

RULE.

A LEASE granted by a mortgagor after mortgage without the mortgagee's concurrence will not bind the mortgagee.

Keech v. Hall and another.

Dougl. 21-23.

Mortgage. — Subsequent Lease by Mortgagor. — Not binding on Mortgagee.

A mortgagee may recover in ejectment (without giving notice to quit), [21] against a tenant who claims under a lease from the mortgagor granted after the mortgage, without the privity of the mortgagee.

Ejectment tried at Guildhall, before BULLER, J., and verdict for the plaintiff. After a motion for a new trial, or leave to enter up judgment of nonsuit, and cause shown, the Court took time to consider; and, now, Lord MANSFIELD stated the case, and gave the opinion of the Court, as follows.

LORD MANSFIELD. — This is an ejectment brought for a warehouse in the city, by a mortgagee, against a lessee under a lease in writing for seven years, made after the date of the mortgage, by the mortgagor, who had continued in possession. The lease was at a rack-rent. The mortgagee had no notice of the lease, nor the lessee any notice of the mortgage. The defendant offered to attorn to the mortgagee before the ejectment was brought. The plaintiff is willing to suffer the defendant to redeem. There was no notice to quit; so that though the written lease should be bad, if the lessee is to be considered as tenant from year to year, the plaintiff must fail in this action. The question, therefore, for the Court to decide is, whether, by the agreement understood between [22] mortgagors and mortgagees, which is, that the latter shall receive interest, and the former keep possession, the mortgagee has given an implied authority to the mortgagor to let from year to year, at a rack-rent; or whether he may not treat the defendant as a trespasser, disseisor, and wrongdoer. No case has been cited, where this question has been agitated, much less decided. The only case at all like the present, is one that was tried before me on the home circuit (*Belchier v. Collins*); but, there, the mortgagee was privy to the lease, and, afterwards by a knavish trick, wanted to turn the tenant out. I do not wonder that such a case has not occurred before. Where the lease is not a beneficial lease, it is for the interest of the mortgagee to continue the tenant; and where it is, the tenant may put himself in the place of the mortgagor and either redeem himself, or get a friend to do it. The idea that the question may be more proper for a Court of equity, goes upon a mistake. It emphatically belongs to a Court of law, in opposition to a Court of equity; for a lessee at a rack-rent is a purchaser for a valuable consideration, and in every case between purchasers for a valuable consideration, a Court of equity must follow not lead the law. On full consideration, we are all clearly of opinion, that there is no inference of fraud or consent against the mortgagee to prevent him from considering the lessee as a wrongdoer. It is rightly admitted

that if the mortgagee had encouraged the tenant to lay out money, he could not maintain this action, but here the question turns upon the agreement between the mortgagor and mortgagee: when the mortgagor is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense, and therefore no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt; on payment of which, the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases, not subject to every circumstance of the mortgage. If by implication the mortgagor had such a power, it must go to a great extent; — to leases where a fine is taken on a renewal for lives. The tenant stands exactly in the situation of the mortgagor. The possession of the mortgagor cannot be considered as holding out a false appearance. It does not induce a belief, that there is no mortgage; for it is the nature of the transaction, that the mortgagor shall continue in possession.

Whoever wants to be secure, when he takes a lease, should [23] inquire after and examine the title deeds. In practice indeed (especially in the case of great estates) that is not often done, because the tenant relies on the honour of his landlord; but whenever one of two innocent persons must be a loser, the rule is, *qui prior est tempore, potior est jure*. If one must suffer, it is he who has not used due diligence in looking into the title. It was said at the bar, that if the plaintiff, in a case like this, can recover, he will also be entitled to the mesne profits from the tenant, in an action of trespass, which would be a manifest hardship and injustice, as the tenant would then pay the rent twice. I give no opinion on that point; but there may be a distinction, for the mortgagor may be considered as receiving the rents in order to pay the interest, by an implied authority from the mortgagee, till he determine his will. As to the lessee's right to reap the crop which he may have sown previous to the determination of the will of the mortgagee, that point does not arise in this case, the ejectment being for a warehouse; but, however that may be, it could be no bar to the mortgagee's recovering in ejectment. It would only give the lessee a right of ingress and egress to take the crop; as to which, with regard to tenants at will, the text of Littleton is clear. We are all clearly of opinion that the plaintiff is entitled to judgment.

No. 19. — *Keech v. Hall*, Dougl. 23. — Notes.

The Solicitor General for the defendant, — Dunning and Cowper
for the plaintiff.

The rule discharged.

ENGLISH NOTES.

Independently of statutory enactment the concurrence of both the mortgagor and mortgagee is required to a demise of the mortgaged lands, unless the mortgage expressly empowers either of the parties to demise the land without the concurrence of the other. In the absence of such a power the mortgagor alone cannot create a lease or tenancy which will bind the mortgagee; and if he purports to create such a lease or tenancy, the mortgagee, or those claiming under him, may eject the lessee or tenant without notice. *Keech v. Hall*, *supra*; *Doe v. Maizey* (1828), 8 B. & C. 767, 32 R. R. 548; *Rogers v. Humphreys* (1835), 4 Ad. & El. 299; *Gibbs v. Cruickshank* (1873), L. R. 8 C. P. 454, 42 L. J. C. P. 273, 28 L. T. 735, 21 W. R. 734.

As a lessee or tenant cannot dispute his landlord's title, a lease or demise by a mortgagor alone after the mortgage will be good until the mortgagee interferes, and will bind the lessee or tenant; and the mortgagor may receive the rents accruing under such a demise, and distrain for them. *Trent v. Hunt* (1853), 9 Ex. 14. And the lease, being voidable not void, is binding on the mortgagor and all persons claiming under him except the mortgagee, and gives to the lessee a sufficient interest in the equity of redemption to entitle him to redeem the mortgage. *Turn v. Turner* (C. A. 1888), 39 Ch. D. 456, 57 L. J. Ch. 1085, 59 L. T. 742, 37 W. R. 276.

If the mortgagee ejects the lessee or tenant of the mortgagor, the mortgagor will be liable to the tenant or lessee in damages for disturbance under his covenant for quiet enjoyment. *Costigan v. Hastler* (1804), 2 Sch. & Lef. 160; see *Carpenter v. Parker* (1857), 3 C. B. (N. S.) 206, 27 L. J. C. P. 78.

The mortgagee may elect not to eject the lessee of the mortgagor, but may recognise him as tenant. The question as to whether there has been such recognition is one of fact for the jury on evidence of conduct on the part of the mortgagee indicating his approbation of the lease, such as giving the tenant notice to quit, or demanding or receiving or distraining for the rent. See *Doe v. Cadwallader* (K. B. 1831), 2 B. & Ad. 473; *Doe v. Hales* (1831), 7 Bing. 322, 33 R. R. 483; *Smith v. Eggington* (1874), L. R. 9 C. P. 145, 43 L. J. C. P. 140, 30 L. T. 521.

The effect of such recognition is not to confirm a lease granted by the mortgagor, but to create a new tenancy from year to year. *Doe v. Bucknell* (1838), 8 C. & P. 566; *Corbett v. Plowden* (C. A. 1884), 25 Ch. D. 678, 54 L. J. Ch. 109, 50 L. T. 740, 32 W. R. 667.

No. 19. — *Keech v. Hall*. — Notes.

If it is proved that the mortgagee has recognised a tenant of the mortgagor as his own tenant he cannot afterwards treat the tenant as a trespasser; and if he treats the tenant as a trespasser, he cannot claim any rights arising from the relation of landlord and tenant. *Birch v. Wright* (K. B. 1786), 1 T. R. 378, 383. In one case, Lord DENMAN said that he was by no means prepared to admit that a jury would not be warranted in inferring a recognition of the tenant's right to hold from the circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises, as before the mortgage, and to lease them out exactly as if his property in them continued. *Evans v. Elliott* (K. B. 1838), 9 Ad. & El. 342. But this *dictum* is perhaps open to question. See *Doe v. Cawallader*, *supra*.

As regards leases by mortgagors and mortgagees in cases of mortgages made on or after the 1st of January, 1882, Sect. 18 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), in effect enacts that either a mortgagor or a mortgagee, while in possession of the mortgaged land shall have power to grant effectual leases thereof. The leases authorised by the section are agricultural or occupation leases for terms not exceeding 21 years, and building leases not exceeding 99 years. There is no power under the section to grant mining leases. A lease granted under this section must take effect in possession, must reserve the best rent obtainable without fine, and must contain a covenant by the lessee for the payment of the rent and a proviso for re-entry on non-payment. A counterpart of the lease must be executed by the lessee and delivered to the mortgagee. In the case of a building lease, a peppercorn, or other rent less than the rent ultimately payable, may be reserved during the first five years of the term. The statutory powers of leasing may be altogether excluded by the mortgage deed, or further or other powers may be thereby given to the mortgagor or mortgagee.

In estimating what is the best rent reasonably obtainable, the circumstances of the case may be regarded as a whole. *Duchess of Sutherland v. Duke of Sutherland*, 1893, 3 Ch. 169, 193, 62 L. J. Ch. 946, 69 L. T. 186, 42 W. R. 12.

A lease granted under this section binds the mortgagee in all respects as if he had been a party to it. *Wilson v. Queen's Club*, 1891, 3 Ch. 522, 60 L. J. Ch. 698, 65 L. T. 42, 40 W. R. 170. And, conversely, though the lessee's covenants are made with the mortgagor enures to the benefit of the mortgagee as owner of the legal reversion as if he had joined in granting the lease. See sect. 10 of the Conveyancing and Law of Property Act, 1881.

As to the meaning of "building lease" within this section. See *In re Chawner's Settled Estates*, 1892, 2 Ch. 192, 61 L. J. Ch. 331, 66 L. T. 745, 40 W. R. 538.

No. 20. — Smith v. Chichester, 2 Dr. & War. 393. — Rule.

AMERICAN NOTES.

This case is cited in 2 Jones on Mortgages, sect. 1066, with *Averill v. Taylor*, 8 New York, 44. See, sustaining this doctrine, *McDermott v. Burke*, 16 California, 580, citing the principal case; *Russum v. Wanser*, 53 Maryland, 92; *Moran v. Pittsburgh Ry. Co.*, 32 Federal Reporter, 878; *American Mortg. Co. v. Turner*, — Alabama, —; *M'Kirche v. Hawley*, 16 Johnson (N. Y.), 289 (before the statute); *Castleman v. O. & I. Belt*, 2 B. Monroe (Kentucky), 157: "There is, so far as we know, no reported case in which it was ever adjudged that a mortgagee could, in virtue merely of any supposed privity of estate, maintain an action for use and occupation against such a sub-tenant of his mortgagor, without any entry upon him, or notice to or express contract with him."

"By our law the mortgagee is considered to have but a chattel interest, and the freehold remains in the mortgagor"; "and now," by statute, "the mortgagor has a right to sell or lease subject to the rights of the mortgagee." *Simers v. Salters*, 3 Denio (N. Y.), 219.

No. 20. — SMITH v. CHICHESTER.

(CH. 1842.)

RULE.

A LEGAL mortgagee of real estate, whether of the fee or of a life estate therein, is entitled to the muniments of title to the estate; and a legal mortgagee of leaseholds is entitled to the lease and all documents relating only to the term.

Smith v. Chichester.

2 Drury & Warren, 393-404.

Mortgage. — Right to Possession of Title Deeds.

[393] The right to the estate confers a right to the possession of the title deeds.

A mortgagee is entitled to the possession of the title deeds of the mortgaged estate, and the mortgagor cannot, by depositing the deeds with his solicitor, with a view of creating a lien, thereby defeat the right of the mortgagee.

A., being entitled to a leasehold interest, in 1814, assigns the same, by way of mortgage, to B. In 1824, A. obtains from the landlord a lease of lives renewable for ever, in lieu of the former interest, and in 1835 deposits this new lease with his solicitor in England, to whom he was considerably indebted for costs at the time. By the decree pronounced at the original hearing, the new lease was declared to be a graft upon the old one, and that the mortgagee was entitled to the

No. 20. — *Smith v. Chichester*, 2 Dr. & War. 393, 394.

benefit of it. *Held*, that the solicitor's lien upon the new lease could not prevail against the mortgagee.

A mortgagee, after the time for payment of the mortgage money has elapsed, executes several sub-mortgages, and then files a bill of foreclosure and sale, making the sub-mortgagees defendants. *Held*, that the sub-mortgagees were entitled to their costs against the plaintiff (the mortgagee), and the plaintiff to have these costs along with his mortgage debt over against the estate.

Sir Arthur Chichester, being entitled to a leasehold interest in certain lands in the county of Donegal, for a term of sixty-one years, by indenture bearing date the 25th of October, 1812, and at a yearly rent of £9 18s. 2*d.*, granted the same in mortgage to Anne Hart, in consideration of a sum of £4061 10s. 9*d.* This deed of mortgage bore date the 18th of July, 1814, and was duly registered on the 3rd of October following.

Anne Hart died in the ensuing year, and the plaintiff was her executor; and he, on the 14th of November, 1823, by deed of that date, assigned in mortgage to Joseph Alexander one-third of said mortgage of the 18th of July, 1814, in consideration of a sum of £800; and by three subsequent deeds, sub-mortgages of the said original mortgage were likewise granted by him, the first on the 25th of November, 1825, to Samuel Cochrane; the next on the 23rd of February, 1837, to Adam Hilton; and the last on the 3rd of July, 1839, to Alexander Arthur.

On the 1st of May, 1824, in consideration of a fine of £500, Sir Arthur Chichester obtained from the Marquess of Donegal a new lease of the mortgaged premises, for three lives, with a covenant for perpetual renewal therein.

* On the 11th of August, 1834, the plaintiff filed a bill [*394] against Sir A. Chichester, seeking an account of what was due on foot of the mortgage of the 18th of July, 1814, and praying that the new lease so obtained by Sir Arthur Chichester might be declared a graft upon the defendant's former interest in the lands, and for a foreclosure and sale. This bill was subsequently amended on the 30th of April, 1836, by bringing before the Court the sub-mortgagees, Thomas Alexander and Joseph Cochrane (the executors of Joseph Alexander, who had since died), and Samuel Cochrane, and certain judgment creditors of Sir Arthur Chichester, who had obtained a receiver over the lands.

By a subsequent deed of the 20th of December, 1836, and made between the said Sir Arthur Chichester of the first part, the plain-

tiff of the second part, and Robert Arthur of the third part, reciting the original lease of October, 1812, the mortgage of the 18th of July, 1814, and the lease of the 1st of May, 1824, and that same was an additional security for the amount of said mortgage debt, the said Sir Arthur Chichester granted unto the said Robert Arthur, his heirs and assigns, all the said lands and premises, upon trust for the plaintiff, and as an additional security for the said sum of £4061 10s. 9d., and all interest and costs then due or thereafter to become due in respect thereof.

On the 18th of May, 1838, the plaintiff filed an amended and supplemental bill, stating the said last-mentioned deed, and that same was in possession of the plaintiff; and further, that the lease of the 1st of May, 1824, was then in the hands of Michael

Clayton, a solicitor, of Lincoln's Inn, who claimed a lien [*395] thereon for costs alleged to be due *to him by the said

Sir Arthur Chichester, and refused to deliver up same, although, as the bill charged, the plaintiff's debt was long prior to the said alleged demand on the part of Clayton.

The bill further stated, that Sir Arthur Chichester had recently been discharged as an insolvent, and that George Scott had been appointed his assignee.

The bill prayed that the plaintiff might have the benefit of the deed of the 20th of December, 1836, and that the freehold interest thereby granted to Arthur, as a trustee for the plaintiff, might in default of payment be sold, together with the term of years demised by the mortgage of 1814, and the proceeds thereof be applied in payment of the plaintiff's demand. There was a prayer of *sub-junctum* against Scott and Clayton, to bring in and lodge all deeds and papers relating to the said lands and premises.

Clayton answered this bill, and thereby stated that he and his partners had been the solicitors of Sir Arthur Chichester for a period of about seventeen years prior to the year 1835; that on the 24th of October, 1835, the said deed of the 1st of May, 1824, came into his possession for the purpose of negotiating a loan from the Globe Insurance Company to Sir Arthur Chichester, which loan was not carried into execution; that the deed had ever since remained in his possession; and that he claimed a lien thereon for costs on account of business done by the defendant for Sir A. Chichester.

On the 12th of November, 1839, the cause was heard, on which

occasion a decretal order was pronounced, declaring that the lease of the 1st of May, 1824, as a graft upon [* 396] the original lease of 1812, without prejudice to any question of priority between the plaintiff and defendants, or any creditors of the said Sir Arthur Chichester. It was thereby referred to the Master, to take an account of what was due to the plaintiff on foot of the mortgage of 1814, and of all prior and contemporaneous incumbrances; and also an account of what was due to the sub-mortgagees, Thomas Alexander, and Joseph Cochrane, and Samuel Cochrane, on foot of their securities; and also an account of what was due to Clayton by Sir A. Chichester, on foot of the costs in the pleadings mentioned. And it was also referred to the Master to report "whether the said defendant, Michael Clayton, had any and what lien as against the defendant, Sir Arthur Chichester, or any other, and what person, on the indenture of the 1st of May, 1824, in respect of such costs, and the nature of such lien, and the amount thereof."

On the 27th of April, 1842, the Master made his report, and thereby found the several sums due respectively to the plaintiff and the sub-mortgagees; and he found that there was due to the defendant, Clayton, on foot of the several taxed bills of costs, in the pleadings mentioned, for business done for Sir A. Chichester from and previous to the year 1827 down to September, 1837, the sum of £813 13s.; that the lease of the 1st of May, 1824, was handed by the defendant, Sir A. Chichester, to Clayton, as his attorney and solicitor, on the 24th of October, 1835; and the Master reported, that the defendant, Clayton, had not a lien for the amount of his said costs, or any part thereof, against the plaintiff, or any other of the creditors by mortgage or judgment of the said Sir A. Chichester; but that he had *a [*397] lien against the defendant, Sir A. Chichester, and against his assignee, Scott, for the said sum of £813 13s., the amount of the said taxed costs.

To this report Clayton excepted, insisting that the Master ought to have found that he had a lien as against the plaintiff, and the mortgage and judgment creditors of Sir A. Chichester.

Mr. William Brooke and Mr. Nelson in support of the exceptions.

The defendant, Clayton, is entitled to priority over the plaintiff and the several sub-mortgagees, whose demands are carved out of

the plaintiff's mortgage. The case of *Bernard v. Drought*, 1 Moll. 38, is a direct authority on the point; for there the lien was established as against an annuitant, whose annuity was prior to the deposit, and upon the ground that the annuitant ought not to have permitted his debtor to retain the deeds. The present case is *a fortiori*, for a mortgagee is bound to get up the deeds, and his permitting the mortgagor to retain them in his own possession is highly improper, and conduct which this Court can never sanction, as it thereby enables the mortgagor to commit a fraud upon third parties. In this case the report finds that the defendant's lien exists as against Sir Arthur Chichester and his assignee. Neither of these parties, therefore, could compel a production without first paying the amount of the defendant's claim. The plaintiff and the sub-mortgagees are creditors of Sir Arthur Chichester, and their right to have the deeds produced is a right against him, and not against the defendant Clayton, between whom and the [* 398] * creditors there exists no privity. The rule laid down by

Lord ELDON, in *Ex parte Shaw*, Jac. 270, 272, directly applies. His Lordship said, "In causes where a motion is made for a party to produce papers in his custody, possession, or power, the order made is for him to produce them; and if they are in the hands of his solicitor, and he cannot produce them without paying his bill of costs, he must pay it." The same rule was laid down by Sir WILLIAM M'MAHON, in *M'Cunn v. Beere*, 1 Hog. 129, who there made an order on the defendant to bring in the deeds, but refused to make it as against the solicitor, saying "that he might have a lien on them as against his client."

Mr. Gilmore, Mr. M'Donnell, and Mr. Hutton, for the plaintiff.

It is admitted in this case, that the deeds did not come into the possession of the defendant, Clayton, until the year 1835, more than twenty years subsequently to the plaintiff's right, and a year after the original bill was filed. Could it be argued for a moment, that Sir A. Chichester himself could have withheld the possession of this deed from the plaintiff; and if not, how could he give a right to the defendant, which he did not himself possess? In *Furlong v. Howard*, 2 Sch. & L. 115, Lord REDESDALE says, "Though a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it, for the benefit of a third person, so also must the solicitor. The common opinion, that the solicitor

may withhold it from all parties in such a case, is erroneous; the right is only as between his client and him." In *Hutchinson v. Joyce*, 2 Jones, 122, Mr. Baron PENNEFATHER says, "What-ever *lien an attorney may have against his client, he [* 399] never can interfere with prior vested rights, which is what he seeks to do in the present instance; for here the deeds came to the possession of the attorney, not only after the execution of the mortgage, but subsequent to the filing of the bill." The cases of *Ex parte Shaw* and *M' Cann v. Beere* have no application here; and *Bernard v. Drought* has always been questioned, though not directly overruled.

The LORD CHANCELLOR (SUGDEN):—

The argument in this case rests entirely upon the case of *Bernard v. Drought*, 1 Moll. 38, before Sir ANTHONY HART. Doubts have been thrown upon that case, and I am not aware of any authority to support the position there laid down, and which is now contended for. The case always appeared to me to be a very doubtful one, even upon this first ground, that in practice, generally speaking, deeds are not deposited with a mere annuitant. There are, of course, annuitants, who are so very careful as to insist upon the possession of the deeds; but such cases form the exception, and the practice generally is to leave them with the grantor of the annuity. On that ground alone, therefore, I think that case cannot be sustained; but as an authority for the general proposition, and so far as it professes to establish, that a man, having mortgaged or disposed of his estate, can afterwards hand over the title deeds to his solicitor, and give to that solicitor a lien against the prior purchaser or mortgagee, I apprehend that it is not law. The right of the purchaser, to whom the conveyance has been made, to *the possession of the title deeds, follows from the effect [* 400] of the purchase itself; and he can maintain an action of trover for them, although they had been delivered over by the person disposing of the estate, with a view of creating a lien.

What are the circumstances of this case? Sir Arthur Chichester was entitled to a lease of the 25th of October, 1812, and this is assigned in mortgage to Mrs. Hart, whom the plaintiff represents. The mortgagee had a legal estate, which Sir Arthur Chichester had no means of defeating. Assuming then that as to this, the old estate, the supposed lien cannot prevail, how can it exist as to the new lease? The Court has, by the decree, declared the new

lease of the 1st of May, 1824, to be a graft upon the old one; and being thus a renewal of the old one, and subject to all the rights and equities which attached on the old lease, the title of the mortgagee is complete, unless this deposit of the deeds can prevail over the mortgage. The party claiming the lien stands in a singular position according to the argument, for it is admitted that as against the old lease there is no lien, yet as against this new lease, which has been decided to be a graft upon the old, it is argued that it does exist. But in the first place, without entering into the question of *lis pendens*, which might be in itself sufficient to dispose of this claim, the defendant's demand here is for bills of costs incurred prior to the period, at which the deposit of the deed took place, which seems to me to render immaterial any question as to notice of the existence of the plaintiff's mortgage; but even if that question was material, the defendant's ignorance was his own fault, for the lease, upon which he claims the lien, recites the former lease, and that Sir A. Chichester was [*401] desirous, in lieu thereof, to obtain a lease *for ever.

The defendant was bound, I say, to have inquired what had become of that lease; and if he had made inquiry, he would have learned, the registry would have told him, that that lease had been conveyed to Mrs. Hart by way of mortgage.

As to the question, who has the right to the deeds, there are some decided cases, which really set the point at rest. In *Hooper v. Ramsbottom*, 6 Taunt. 12, the marginal note is, if the vendor of a leasehold estate delivers the conveyance as an escrow, to take effect on payment of the residue of the purchase money, the property in the title deeds of the estate is so vested in the vendee, that the vendor obtaining possession of them, and pawning them, confers on the pawnee no right to detain them after tender of the residue of the purchase money. There the deeds of conveyance were delivered only as an escrow, the purchaser had not completed his purchase; yet it was held that the deeds belonged to him, and that as against him they could not be legally pledged. This case goes a long way to show what the right is in such cases. In *Harrington v. Price*, 3 B. & Ad. 170 (37 R. R. 374), the purchaser of an estate brought an action of trover against a subsequent mortgagee, who had advanced money to the vendor upon a deposit of the deeds, and the Court of King's Bench held, that the purchaser being the legal owner, was entitled to recover

the deeds from the mortgagee. Lord TEXTERDEN, in pronouncing his judgment, says, "It is an established principle, that whoever is entitled to the land has also a right to all the deeds affecting it." *Philips v. Robinson*, 4 Bing. 106 (29 R. R. 518), is a good illustration of the extent to which the principle has been carried: there a husband delivered certain deeds, [*402] belonging to his wife's estate, to a conveyancer, with instructions to prepare a conveyance, which was accordingly drawn, and a fine levied, the uses of which were declared to be to such person as the wife should appoint, and in default of appointment, to one of the sons of the marriage. It was held clearly, that the husband could not maintain an action of detinue for the deeds against the conveyancer; for, having no right to the estate, he therefore had no right to the deeds. The language of Lord Chief Justice BEST is, "It is a clear principle of law, that the muniments of an estate belong to the person, who has the legal interest in it." If that is so, how much stronger is the present case? How can the solicitor of the grantor acquire a lien upon the title deeds against a party, in whose favour there has been a previous actual disposition of the estate itself? Nothing would open a greater door to fraud than a contrary doctrine; whether it would be for the benefit of solicitors or not, I will not say. The law, however, is the other way, and is clearly settled; the right to the estate confers the right to the possession of the title deeds. The exception, therefore, must be overruled.

Mr. Brewster, for one of the sub-mortgagees, asked for his costs.

On the part of the defendant, Sir Arthur Chichester, it was insisted, that these costs should be borne by the plaintiff, and that he should not have them over against the estate. These defendants had been rendered necessary parties by the plaintiff's own act. No reason was assigned why they were not joined as co-plaintiffs; there was no allegation * in the bill that they [*403] were applied to, and refused. *Skipp v. Wyatt*, 1 Cox, 353, was directly in point.

Mr. Gilmore, Mr. M'Donnell, and Mr. Hutton, for the plaintiff.

These defendants were not made co-plaintiffs, because their rights were to some extent adverse to the plaintiff. The rule as to costs in cases of this kind is quite settled by the cases of *Wetherell v. Collins*, 3 Madd. 255 (18 R. R. 229), and *Bartle v. Wilkins*, 8 Sim. 238.

The LORD CHANCELLOR : —

With regard to the question of costs, the practice is quite settled; the authorities are conclusive. In *Skipp v. Wiggatt*, it is true Lord KENYON, when Master of the Rolls, held, that the heir at law of the mortgagee was not entitled to his costs out of the mortgagor's estate. In that case, he was made a party, in order to have the will established against him. However, without attempting to draw a distinction to support that decision, the two later cases of *Wetherell v. Collins*, and *Bartle v. Wilkins*, 8 Sim. 239, are decisive as to the present practice. In *Wetherell v. Collins*, Sir JOHN LEACH says, "At first sight it seems to be a great hardship that the mortgagor is to pay the costs of persons claiming under the mortgagee, and made necessary parties by his act; but it is the constant course of the Court, and it is to be supported upon this principle, that at law, after a mortgage is [*404] forfeited, the estate is the absolute property of *the mortgagor, and he may deal with it as his own; and if the mortgagee comes for the redemption, which the equity of the Court gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts." That was a suit by the mortgagor for a redemption. *Bartle v. Wilkins* is by a mortgagee for a foreclosure, and is exactly the case now before the Court. There the mortgagee, having put the mortgage money into settlement, filed a bill of foreclosure, and made the trustee of the settlement a party defendant. The VICE-CHANCELLOR directed the trustees' costs to be paid by the plaintiffs, and added to the mortgage debt, and said that the reasoning of Sir JOHN LEACH, in *Wetherell v. Collins*, applied to a foreclosure as well as to a redemption suit. My only difficulty arises from the fact, that no sufficient excuse has been assigned why these defendants were not made co-plaintiffs; for certainly, if it could be shown that a mortgagee, vexatiously, and with a view to harass the mortgagor, had assigned his security, I would not give, as against the estate of a mortgagor, the costs occasioned by such a dealing with the mortgage. However, no such special case has been established here; and though the reason alleged does not altogether satisfy me, I must, following the authorities which have been referred to, give these defendants their costs as against the plaintiff; the plaintiff to have them along with his mortgage debt over against the estate.

No. 21. — Ex parte Bisdee: In re Baker. — Rule.

ENGLISH NOTES.

It is a clear principle of law that the muniments of an estate belong to the person who holds the legal interest in it, per BEST, Ch. J., in *Philips v. Robinson* (1827), 4 Bing. 106, 29 R. R. 518. Accordingly, a legal mortgagee in fee is entitled to the title deeds as laid down in the above Ruling Case; so also is the legal mortgagee of a life estate.

A legal mortgagee of leaseholds is entitled to the lease and to all subsequent deeds and documents affecting the title to the leasehold interest. *Hooper v. Ramsbottom* (1815), 6 Taunt. 12. But he is not entitled to the title deeds relating to the freehold, whatever be the length of his term. *Wiseman v. Westland* (1826), 1 Y. & Jer. 123, 30 R. R. 765.

The legal owner of an estate having the deeds may retain them as against an equitable mortgagee. *Harrington v. Price* (1832), 3 B. & Ad. 170, 37 R. R. 374.

A mortgagee should always be careful to require the deeds to be delivered to him. If he neglects to do so, he will be liable to lose his priority, to which he would otherwise be entitled on two grounds:—first, because inasmuch as delivery of the deeds authorises the inference that there is no prior mortgage, so the absence of the deeds, unless explained, may affect the mortgagee with constructive notice of a prior incumbrance in favour of a person to whom the deeds have been delivered; and secondly, because a mortgagee, by allowing the mortgagor to retain the deeds in his own possession, enables the latter by suppressing the prior mortgage to deal with the property as if he were the owner of it free from incumbrances. See further on this point, Nos. 6 and 7 of “Equitable Title,” and notes, 10 R. C. pp. 507–533.

No. 21.—EX PARTE BISDEE: IN RE BAKER.

(BK. 1840.)

RULE.

A MORTGAGEE, by virtue of his beneficial interest under the mortgage, is entitled to all accretions to or substitutions for the mortgaged property, whether his security is legal or equitable.

No. 21. — *Ex parte Bisdee: In re Baker*, 9 L. J. (N. S.) Bk. 9.

Ex parte Bisdee: In re Baker.

9 L. J. (N. S.) Bk. 9-10 (s. c. 1 Mont. D. & De G. 333).

[9] *Mortgage. — Equitable Mortgage. — Memorandum.*

One owner in fee of an estate, subject to a mortgage, and also entitled to two-thirds of another estate, deposited the title deeds relating thereto, to secure a debt. Afterwards, he wrote a letter to the depositor in the following terms: — "Dear Sir, I will thank you to send by the bearer the deeds I called for last Saturday, in Bristol. You will retain the Butcombe deeds and the bond. Those you let me have, shall be returned again about the middle of the month; and this in the meantime shall be my receipt for them, and undertaking for re-delivery." Subsequently, he redeemed the prior mortgage, and took a surrender of the term. Of the other estate, he procured a partition, giving £100 for equality of partition. Neither of the deeds by which these alterations were effected, was deposited with the creditor. The debtor became bankrupt. *Held*, that the letter was a sufficient memorandum in writing, and also that the equitable mortgage extended to the estate freed from the prior mortgage, and to the estate received in partition.

This was the petition of Samuel Bisdee. The petition stated, that in the year 1831, the bankrupt Baker borrowed the sum of £1300 from the petitioner, upon the bond of the bankrupt, and upon the deposit of certain title deeds, one of which related to two third parts or undivided shares of certain lands and premises, situate in the parishes of Blagdon and Butcombe, in the county of Somerset; another to the entirety of the equity of redemption of certain other lands in Blagdon, which were at that time subject to two mortgages; and a third related to certain premises called the Steep Holmes. That in 1833, the bankrupt borrowed the title deeds relating to the property called the Steep Holmes, having written the following letter to the petitioner: — "Dear Sir, — I will thank you to send by the bearer the deeds I called for last Saturday, in Bristol. You will retain the Butcombe deeds and the bond. Those you let me have, shall be returned again about the middle of the month; and this in the meantime shall be my receipt for them, and undertaking for re-delivery." That, instead of returning those deeds, the bankrupt sold the property to which they related. It further appeared from the petition, and the affidavit of the bankrupt, that in the year 1833 the bankrupt paid off one of the mortgages upon the first-mentioned estate, and took a surrender of the mortgage term to himself; and that about the same time he obtained a partition of the estate, the title deeds to

two-thirds of which he had deposited with the petitioners as above stated, he giving £100 for equality of partition, which the bankrupt, in his affidavit, stated he paid for the purpose of increasing the security of the petitioner, on account of his having taken away the title deeds relating to the Steep Holmes, and by so doing, having reduced the security of the petitioner.

Neither the deed surrendering the mortgage term, nor the deed of partition, was deposited with the petitioner; but, upon the bankruptcy of Baker, they passed into the hands of his assignees. The petition prayed that Samuel Bisdee might be declared equitable mortgagee of the premises as they now stood.

The question was, what portion of the proceeds of the sale of the property should go to the petitioner; that is, whether the petitioner was equitable mortgagee of the premises as they now stood, or only as they stood prior to the mortgage being paid off, and the partition being effected.

Mr. Rogers, for the petitioner. — The petitioner is entitled to the premises as they now stand. If a mortgagor pays off a prior mortgage, that is for the benefit of the subsequent incumbrancers. In *Toulmin v. Steere*, 3 Mer. 224 (17 R. R. 67), the MASTER OF THE ROLLS mentioned the cases of *Greswold v. Marsham*, 2 Ch. Ca. 170, and *Mocatta v. Murgatroyd*, 1 P. Wms. 393, as express authorities to show, that one purchasing an equity of redemption cannot set up a prior mortgage of his own, nor consequently a mortgage which he has got in, against subsequent incumbrancers of which he had notice. That brings it to this: if a person who has an interest deals with that by buying off an incumbrance,

* it operates for the benefit of the inheritance; by the first [* 10] mortgagee being satisfied, the second becomes the first.

[Sir G. ROSE. — This is not exactly the same case; here, you seem to contract for a specific thing.]

The question of contract does not arise; the assignees could never have redeemed this estate without paying the incumbrances in full. The next question will be as to the money paid by the bankrupt for equality of partition. The bankrupt himself states, that he paid it to increase the security of the petitioner. The prayer of the petition is founded upon general principles. If a trustee renew a lease, the trust will attach upon that; so, if a mortgagor of a share of an estate make a partition, and get an entire portion, the mortgage will attach upon that. In the same

way, there having been here an equitable mortgage by the owner of an undivided share of an estate, and a partition having been effected, the petitioner is entitled to the benefit of that partition.

Mr. Osborne, for the assignees. — The question is, what interest will the petitioner take by the sale of the property comprised in the deeds. One part of the property was a freehold estate, as to which, the bankrupt was only entitled to the equity of redemption; and the deed conveying this to him was deposited by him with the petitioner; therefore, all that he contracted about was for what he then owned, namely, the equity of redemption. Then as to the partition, surely the bankrupt cannot, by now saying that he paid the £100 to increase the security of the petitioner, prejudice his other creditors to that amount.

Mr. Rogers, in reply.

Sir J. Cross. — It seems to me, that as to the first property, of which, the bankrupt was owner in fee, the petitioner is entitled to it, freed from the mortgage which has been paid off by the bankrupt; and as to the second, which has undergone a partition, I am equally clear that he is entitled to that also, as it now stands.

Sir G. Rose. — The order must be the common order. The only question in this case is a question of fact, as to the extent of the contract. And I think, that the contract was quite large enough for all that the bankrupt had deposited, and the memorandum is also large enough. I am therefore of opinion, that the contract was not intended to limit the security to the property, as it stood at the date of the deposit, and that consequently the property as it now stands is the petitioner's security.

ENGLISH NOTES.

In accordance with the above Rule, it has been held that a mortgagee of a manor is entitled to copyholds of the manor subsequently purchased by and surrendered to the lord. *Doe d. Gibbons v. Pott* (K. B. 1781), 2 Doug. 709.

So also if a lease which is comprised in the mortgage is renewed by the mortgagor, the new lease will be deemed to be a graft upon the old one, and subject in equity to the mortgage. *Moody v. Matthews* (1802), 7 Ves. 174. And where leaseholds were charged with the payment of certain moneys, and the owner purchased the reversion in fee which was conveyed to a trustee for him, it was held that the moneys were a subsisting charge on the fee. *Trumper v. Trumper* (1873), L. R. 8 Ch. 870, 42 L. J. Ch. 641, 29 L. T. 86, 21 W. R. 692.

No. 22. — *Nicholls v. Maynard*, 3 Atk. 519. — Rule.

If mortgaged lands are taken compulsorily by a public company under the Lands Clauses Act, 1845 (8 & 9 Vict., c. 18), the compensation money paid in respect of the lands will become subject to the security. *Ranken v. East and West India Dock Co.* (1849), 12 Beav. 298. So also, where trade premises subject to a mortgage were taken, the mortgagee was held entitled to include in his security the compensation for the goodwill of the business. *Pile v. Pile* (C. A. 1876), 3 Ch. D. 36, 45 L. J. Ch. 481, 35 L. T. 18, 24 W. R. 1003.

On the same principle, where a chattel is pledged, the pledgee is entitled to whatever by natural increase becomes accessory to the chattel, as the young of sheep born after a pledge of the flock. Story on Bailments, ss. 292, 314.

A mortgagee is as a general rule entitled to fixtures annexed to the freehold at the time of the mortgage, or which are subsequently brought upon and affixed to the land. *Hitchman v. Walton* (1838), 4 M. & W. 409. See "Fixtures," 12 R. C., p. 193, *et seq.*

AMERICAN NOTES.

Principal case cited in 1 Jones on Mortgages, sect. 181, with no American citations.

As to fixtures added by the mortgagor, see *ante*, vol. 12, p. 223.

No. 22. — NICHOLLS *v.* MAYNARD.

(1747.)

RULE.

A STIPULATION in a mortgage deed that the rate of interest shall be raised if interest at the normal rate is not punctually paid is regarded in equity as a penalty, and will be relieved against; but a proviso that the normal rate shall be reduced if interest be punctually paid at a lower rate is valid, and will be strictly enforced.

Nicholls v. Maynard.

3 Atk. 519-520.

Mortgage. — Proviso for Reduction of Interest.

Where a mortgage is at four and an half per cent with a proviso that [519] if the interest be paid after each half year before three quarters of a year become due, the mortgagee will accept of four per cent if the mortgagor fails

No. 22. — *Nicholls v. Maynard*, 3 Atk. 519, 520.

of paying the interest at the appointed time, he cannot be relieved in this Court.

Where a mortgage is made with a reservation of four per cent interest, and a proviso that, on non-payment thereof within a certain time after it is due, the mortgagor shall pay five, this is but as a *nomine pœna*, and relievable in equity.

The late Marquis (of Powis) and the petitioner joined in mortgaging an estate for securing twelve thousand pounds borrowed of Sir Charles Gunter Nicholls deceased, with interest at four and a half per cent, but there was a verbal agreement, that if the mortgagor paid the interest for every half year before the third quarter became due, that the mortgagee would allow him [* 520] an *abate of half a per cent. At the death of Sir Charles

Gunter Nicholls, there was a considerable arrear of interest, and the mortgagor proposed, if the defendant, the trustee for the plaintiffs, daughters of Sir Charles Gunter Nicholls, and devisees of the twelve thousand pounds, would agree to take four per cent for the arrear of interest, that the mortgagor would be bound to continue the mortgage for seven years; upon this proposal it was referred by the Court to a Master to see if it was for the benefit of the infants; the Master reported it to be so, and that report was confirmed, and afterwards the interest was regularly paid at the end of every half year, before the third quarter was lapsed, to the late Marquis's death.

The petitioner having been entangled in a great many perplexed affairs, has suffered the interest to run considerably in arrear since, but now offers to the infant's guardian and trustee to pay the arrear of interest at four per cent, and as an equivalent for the other half per cent, interest upon interest, to be computed from the end of each half year; the simple interest and the interest upon interest amount together to a thousand and one pound eleven shillings.

One of the mortgagee's daughters is dead, and the whole beneficial interest in the twelve thousand pounds vests in the survivor.

It was prayed by the petition, with the desire of all parties, that, to save the expense of going before the Master, this sum may be ordered to be paid to the infant's trustee, on or before the 22nd of July next, in full of interest due to the 22nd of December last.

I do not see how I can make such an order, as an infant is concerned; for as the mortgage is at four and a half per cent with a proviso, that if the interest be paid after each half year, before three quarters of a year become due, the mortgagee will accept of four per cent, if the mortgagor fails of paying the interest at the appointed time, he cannot be relieved in this Court any more than on any other composition between parties, because the abate of half per cent by the mortgagee was for prompt payment, and the terms of the agreement not being complied with, the mortgagee and his representative are entitled to interest at four and a half per cent; but if the mortgage had been made, with a reservation of four per cent interest, with a proviso that upon non-payment thereof, within a certain time after it is due, the mortgagor shall pay five per cent, such proviso would not be good, and has been determined several times; because where the interest is to be increased, if not paid at the day, that is but as a *nomine pœnæ*, and relievable in equity. (Vide Vin. Abridg. title Mortg. 452, letter M.)

LORD CHANCELLOR (LORD HARDWICKE) referred it to a Master, to see whether the proposal made by the mortgagor would be for the infant's benefit.

ENGLISH NOTES.

The legality of a proviso that the fixed rate of interest shall be reduced on punctual payment at a lower rate is well established. *Jory v. Cox*, Pre. Ch. 160; *Seton v. Slade* (1802), 7 Ves. 265, 6 R. R. 124; *Wallingford v. Mutual, &c. Society* (H. L. 1880), 5 App. Cas. 685, 50 L. J. Q. B. 49, 43 L. T. 258, 29 W. R. 81.

Conditions as to time or otherwise attached to such provisoes must be strictly performed, unless waived, to entitle the mortgagor to claim the reduction. *Bonafous v. Rybot* (1763), 3 Burr. 1371.

A single default will not deprive the mortgagor of the benefit of the proviso in respect of subsequent payments punctually made. *Stanhope v. Manners* (1763), 2 Eden, 197.

The performance of the condition may be waived even by a trustee. *Booth v. Alington* (1856), 3 Jur. (N. S.) 49, 26 L. J. Ch. 138.

A mortgagee in possession is entitled to interest at the unreduced rate. *Union Bank of London v. Ingram* (1880), 16 Ch. D. 53, 50 L. J. Ch. 74, 43 L. T. 659, 29 W. R. 209; *Cockburn v. Edwards* (C. A. 1881), 18 Ch. D. 449, 51 L. J. Ch. 46, 45 L. T. 500, 30 W. R. 446; *Bright v. Campbell* (1889), 41 Ch. D. 388, 60 L. T. 731, 37 W. R. 745.

Where mortgagees assented to an order for payment out of a fund in

No. 23. — Daniell v. Sinclair, 6 App. Cas. 181. — Rule.

Court, and owing to delay in completion of the order, the interest was not punctually paid, they were compelled to accept interest at the reduced rate. *Re Moss, Leey v. Sewell* (1885), 31 Ch. D. 90, 55 L. J. Ch. 87, 54 L. T. 49, 34 W. R. 59.

The rule that the fixed rate of interest cannot be raised on default in punctual payment is subject to an exception, where the rate is increased by an agreement subsequent to, and independent of the mortgage, in consideration of forbearance. *Brown v. Barkham* (1720), 1 P. Wms. 652; *Law v. Glenn* (1867), L. R. 2 Ch. 634.

AMERICAN NOTES.

The rate of interest in the mortgage cannot be increased by an unrecorded agreement so as to affect subsequent purchasers or incumbrancers. *Gardner v. Emerson*, 40 Illinois, 296. So the interest cannot be changed from currency to gold when it is at a premium. *Taylor v. Atlantic & G. W. Ry. Co.*, 55 Howard Practice (N. Y.), 275. But the owner of the equity of redemption may bind himself, and charge the land for a higher rate for a consideration, such as, forbearance, by an agreement in writing. *Smith v. Graham*, 34 Michigan, 302; *Taylor v. Thomas*, 61 Georgia, 472.

No. 23. — DANIELL v. SINCLAIR.

(P. C. 1881.)

RULE.

IN the absence of express stipulation a mortgagee will not be allowed to charge the mortgagor with interest upon interest.

Daniell (Appellant and Defendant) v. Sinclair (Respondent and Plaintiff).

6 App. Cas. 181–192 (s. c. 50 L. J. P. C. 50; 44 L. T. 257; 29 W. R. 569).

[181] *Mortgagor and Mortgagee. — Settled Account re-opened, Compound Interest charged by Mistake. — Mutual Mistake of Law.*

In the absence of special agreement simple interest only can be charged in a mortgage account.

Where such mortgage account had been settled on the footing of compound interest with half-yearly rests, both parties wrongly understanding the mortgage deed to require the same: —

Held, that such settled account might be reopened.

Although under certain circumstances the giving credit in account may be treated as so far equivalent to payment under mistake of law as to prevent sums

wrongly credited being recoverable at law; yet in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn.

Appeal from an order of the Court of Appeal of New Zealand (Feb. 4, 1880) affirming a decree (Oct. 1, 1879) of the Supreme Court.

This latter decree, so far as it was originally appealed against, decreed that simple interest only since the 4th of January, 1869, should be allowed upon £2472 4s. 6d., the balance admitted as the principal sum due by the respondent to the appellant on that date, on the footing of a mortgage dated the 11th of May, 1865, and that in taking an account as thereby directed, the account hereinafter mentioned as signed by the respondent on the 11th of May, 1872, should not be considered as a stated and settled account between the parties ascertaining and fixing the amount due on that date.

The circumstances out of which the suit arose and the findings* of the jury thereon are set out in the judgment [*182] of their Lordships.

The judgment of the Court of Appeal was to the effect that compound interest could not be charged, there being no agreement to that effect between the parties, either express or implied. Upon the latter point it proceeded:—

“But, assuming that an agreement may be implied between mortgagor and mortgagee, pure and simple, to pay compound interest founded upon the acts, mode of dealing, or acquiescence of the parties, the question remains whether such an agreement ought to be implied in the present case.

“This question may be dealt with in either of two modes, viz., either by looking at the facts admitted by the pleadings and the findings of the jury only, which we take to be the mode more in accordance with the rules of the Supreme Court of New Zealand, or by looking not only at these, but also at the evidence laid before the jury, as perhaps a Court of Equity in England would do. We shall adopt both modes.

“Taking the first mode, we find that the respondent, upon the 4th of January, 1869 (the mortgage being dated the 11th of May, 1865, payable on the 11th of May, 1867), admitted by deed his indebtedness to be £2547 12s. 2d., a portion of which amount was composed of compound interest, of which the respondent was at

the time aware. This, on the principle of *Blackburn v. Warwick*, 2 Y. & C. (Ex.) 99, concludes him up to that date, and it is on that basis that the direction appealed against proceeds.

“ But that does not imply any agreement to pay similar compound interest in future. *Fergusson v. Flyffe*, 8 Cl. & F. 121, and *Blackburn v. Warwick*, *supra*, establish this. Then we find that the accounts between the respondent and the appellant have always been kept with half-yearly rests, and that the interest due at such half-yearly rests has been added to the principal and interest charged thereon accordingly. Now the interest on the mortgage was payable not half-yearly but quarterly, and it is difficult to understand why these rests should have been made half-yearly,

except upon the presumption which we shall hereafter refer [*183] to; and assuming *that by the finding that the accounts

were so “ kept ” is meant that they were so prepared by appellant, rendered to respondent, and not objected to by him, this cannot constitute an agreement by acquiescence, otherwise *Tompson v. Leith*, 4 Jur. (N.S.) 1091, was wrongly decided. There, there were not only accounts rendered, but formal notice given that interest on interest would be charged, which was never objected to. In *Clancarty v. Latouch*, 1 Ball. & B. 420, the acquiescence in accounts rendered, which was held to imply an agreement, was an acquiescence in a common mercantile custom of bankers on a banker’s account.

“ Then we find that the respondent, on the supposition that the mortgage authorised the defendant to charge compound interest, consented to the accounts being so kept, and ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts.

“ Now, even admitting the supposition of the respondent referred to, it seems to us that the ratifying and confirming in writing (not by deed) of accounts rendered, and an admission of indebtedness to the amount shown, is not conclusive, though it may be presumptive evidence of the accuracy of such accounts.

“ Errors, whether in calculation or in mode of charging, might, nevertheless, be urged in defence to an action on the account stated, although they might not form a ground for recovering an amount erroneously paid. *Rose v. Savory*, 2 Scott, 199; *Thomas v. Hawkes*, 8 M. & W. 140; *Wilson v. Wilson*, 14 C. B. 616. But when taken in conjunction with the finding of the jury as

to the respondent's state of mind when making the admission of indebtedness, we do not think much weight ought to be attached to such admissions, and certainly they cannot be accepted as implying an agreement to pay compound interest in face of the deed of mortgage.

"These, according to this mode of dealing with the question, are the only facts in support of an implied agreement to pay compound interest; whilst, on the other hand, it appears from the declaration that both parties are merchants, and therefore

*accustomed to keep accounts of their ordinary mercantile [*184] transactions in the form in which these mortgage interest accounts have been kept. Indeed, the balance of their mercantile account, £15 7s. 8d., seems to have been mixed up with the interest account, and on that sum compound interest has been allowed by consent, although otherwise the Court could not on the principle of *Fergusson v. Fyffe*, 8 Cl. & F. 121, and other cases, have allowed it.

"Taking now the other mode of considering this question, by looking, in addition, at the evidence submitted to the jury, it appears to us that the evidence scarcely bears out the finding of the jury. The evidence shows an acquiescence in, rather than a consent to, the mode in which the accounts were kept, and the hesitating and bald certificates to the two accounts rendered do not to our minds amount to a ratification and confirmation of accounts, nor an admission of indebtedness sufficient to stop the respondent from setting up his legal and equitable rights under the mortgage deed.

"In either view it seems to us that *Tompson v. Leith* was a much stronger case than the present one for allowing compound interest. There deliberate notice was from time to time given of the intention to charge compound interest, and that notice in writing, if not formally consented to, was in writing acquiesced in. Here the two parties treat their mortgage rights and liberties as if they were upon ordinary mercantile accounts, apparently ignorant or oblivious of the difference between the two sets of positions.

"*Crosskill v. Bower*, 32 Beav. 86, also seems to us a strong authority for the respondent, the portion of the judgment therein so strongly relied on in argument by Mr. Bell applying clearly to the mercantile account, not to the mortgage debt; whilst the

case of *Mosse v. Salt*, 32 Beav. 269, 32 L. J. Ch. 456, relied on in the judgment of the Court below, seems to us to be in point, and well applied."

Mr. Benjamin, Q.C., and Mr. Everitt, for the appellant, contended that compound interest had been charged in the [*185] account *with the consent of the respondent. The appellant had, on the faith of his settling accounts from time to time on that footing, continued to give credit to him, and, therefore, there was consideration. It was unnecessary that such consent should be evidenced by deed. The settled account was evidence sufficient. There was no *primâ facie* case made out for relieving the respondent from the consequences thereof. Here there was express agreement with some consideration, and notwithstanding mistakes of law, *i. e.*, as to the construction of a deed and the legal rights of the parties thereunder, the agreement was valid and binding. Reference was made to *Mosse v. Salt*, 32 Beav. 269; 32 L. J. Ch. 756; *Clancarty v. Latouch*, 1 Ball. & B. 420; *Crosskill v. Bower*, 32 Beav. 86; *Blackburn v. Warwick*, 2 Y. & C. (Ex.) 99; *Chambers v. Goldwin*, 9 Ves. 271; *Tompson v. Leith*, 4 Jur. (N.S.), 1091; *Stewart v. Stewart*, 6 Cl. & F. 911; *Kitchin v. Hawkins*, L. R. 2 C. P. 22; *Rogers v. Ingham*, 3 Ch. D. 351; *Alliance Bank v. Broom*, 2 Dr. & S. 289. To get leave to surcharge and falsify you must, according to equity rules and procedure, allege and prove errors of account in fact, and that has not been done here. *Parkinson v. Hanbury*, L. R. 2 H. L. 1; *Drew v. Power*, 1 Sch. & Lef. 182; *Gething v. Keighley*, 9 Ch. D. 547; *Fergusson v. Fyffe*, 8 Cl. & F. 121. [Sir BARNES PEACOCK referred to *Skyring v. Greenwood*, 4 B. & C. 218 (28 R. R. 264)]. See also notes to "Smith's Leading Cases," vol. ii. [7th ed.], pp. 420, 421; "Seton on Decrees," vol. ii., part 4, pp. 794, 796 [4th ed.].

Mr. Rigby, and Mr. Chambers (the Solicitor-General, Sir F. Herschell, Q.C., with them), for the respondent, contended that compound interest was not recoverable. The Court of Appeal was right in holding that there was an acquiescence in, rather than a consent to, the mode in which the accounts were kept. The settled accounts, although *primâ facie* evidence of indebtedness, could not estop the respondent from setting up his rights [*186] *under the mortgage deed. Moreover, a mortgagee relying on a settled account must plead it. See *Roberts v. Kiffin*, 2 Atk. 112, a case recognised as authority by *Maddocks*,

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and all successive editors of Daniell's "Chancery Practice," and by Lindley. In surcharging and falsifying an account errors of law as well as of fact may be corrected. Equity does not distinguish between mistakes of law and mistakes of fact as a ground for relief, except that it will not come into conflict with Courts of law; and as the latter have laid it down that money actually paid under a mistake of law cannot be recovered back, that principle is not interfered with. One error is sufficient to open an account — perhaps an error of fact, but, when open, errors of law may be corrected. There is no authority to be cited that an account may be opened for mistake of law, for it has never been questioned. Reference was made to *Rogers v. Ingham*, 3 Ch. D. 351; *Re James*, L. R. 9 Ch. 609; *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223; *Rose v. Savory*, 2 Scott, 199; *Thomas v. Hawkes*, 8 M. & W. 140. The rule relied upon is merely one which is intended to put an end to litigation, and therefore is not applicable till money has been actually paid; mere settlement of account is not enough. *Wilson v. Wilson*, 14 C. B. 616. It is not pleaded that accounts were signed because forbearance was agreed to be given. *London Chartered Bank of India v. White*, 4 App. Cas. 413, 424. Reference was also made to *Kendal v. Wood*, L. R. 6 Ex. 243.

Mr. Benjamin, Q.C., replied.

The judgment of their Lordships¹ was delivered by

Sir ROBERT P. COLLIER: —

This was a suit instituted for the redemption of a mortgage, and an account of the principal and interest due. The defendant contended that compound interest was due, and whether the interest was to be simple or compound was the only question in * the cause. The Court of first instance gave judgment in [* 187] favour of the plaintiff, with the exception of a small sum of compound interest, which the plaintiff by the deeds of further security to be afterwards referred to had converted into principal. This judgment was affirmed by the Court of Appeal. From the latter judgment the present appeal is preferred.

The plaintiff is a merchant in New Zealand, the defendant a merchant in London. The declaration sets out a mortgage bearing date the 11th of May, 1865, for the purpose of securing payment of £2000, advanced by the defendant to the plaintiff for two years,

¹ *Present*: — Sir BARNES PEACOCK, Sir MONTAGUE E. SMITH, Sir ROBERT P. COLLIER, and Sir RICHARD COUCH.

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and of all such further and other sums, if any, as may at any time hereafter be due and owing by the mortgagor to the mortgagee on the balance of any account current hereinafter existing between the said parties hereto, or in respect to any future advances to be made between the said parties in any account whatsoever; then follows a covenant to pay interest at the rate of 10 per cent on the balance of account current after demand in writing, and to pay the principal sum on the 11th of May, 1867, and interest thereon at 10 per cent in quarterly payments.

The declaration further sets out two conveyances, dated the 4th of January, 1869, to one Stuart, for the purpose, in the first place, of securing a debt to Stuart; and, secondly, of further securing the debt to the defendant, which the plaintiff acknowledged then to amount to £2487 12s. 2d. (which addition of £487 12s. 2d. to the principal was composed partly of compound interest), with a power of sale to Stuart, for, in the first place, paying himself, and then making payments to the defendant. The declaration alleges sales by Stuart and the defendant, and some payments by Stuart to the defendant, and prays for an account of the principal and interest due on the mortgage, and a reconveyance.

The material pleas by the defendant are, 1, that the moneys advanced by him were advanced on a mercantile account current; 2, that it was agreed between plaintiff and defendant, both at the time of and immediately after the execution of the deed set out in the first paragraph of the plaintiff's declaration, that in taking and keeping the account current between the plaintiff and

[* 188] * defendant half-yearly rests should be taken, and that the interest due on the half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly; and the accounts have always been so kept with the consent of the plaintiff, who has from time to time ratified accounts so kept, and admitted his indebtedness to the defendant of the whole amount shown in such accounts, where interest has been computed upon half-yearly rests.

The defendant submitted to the taking of the accounts as prayed.

The plaintiff, in reply, denied the agreement.

The following are the material issues in the case, and the findings upon them by the jury:—

Was the amount of the plaintiff's indebtedness to the defendant on the 4th of January, 1869, the sum of £2487 12s. 2d.?—Yes.

If so, was the said sum of £2487 12s. 2d. composed of the principal sum of £2000 mentioned in the said deed of mortgage, and £487 12s. 2d. interest due in respect of the said principal sum? — Yes, except £15 7s. 8d., deficiency in proceeds of wool consigned by plaintiff to defendant.

Was the said principal sum of £2000 advanced by the defendant to the plaintiff on a mercantile account current? — By direction, No.

Was any portion of the said sum of £2487 12s. 2d. advanced by the defendant to the plaintiff upon a mercantile account current, and, if so, how much? — Yes, the said sum of £15 7s. 8d., and no more.

Was it agreed by and between the plaintiff and defendant, after the execution of the deed set out in the first paragraph of the declaration, that in taking and keeping the accounts between the plaintiff and the defendant half-yearly rests should be taken, and that the interest due at such half-yearly rests should be added to and become part of the principal moneys, and bear interest accordingly? — No, unless such agreement ought in law to be implied from the plaintiff's accounts being so kept. But we find that he so consented on the supposition that a deed in the terms

* of the mortgage of the 11th of May, 1865, authorised the [* 189] defendant to charge compound interest.

Have the accounts always been so kept? — Yes.

Has the plaintiff consented to the accounts being so kept, and has he ratified and confirmed in writing accounts so kept, and admitted his indebtedness as appearing by such accounts? — Yes.

No attempt was made at the trial to prove an actual agreement, either written or oral, to change the interest, as stipulated in the mortgage deed, from simple to compound, and it seems clear that no such agreement was ever made. But it appeared that the plaintiff, under the belief that he was bound to pay compound interest on the mortgage, assented to accounts made out on the footing of half-yearly rests, and that, in particular, on an account being sent to him stating a balance of £3464 16s. 2d. as due on the 11th of May, 1872, part of which consisted of compound interest charged on the footing of half-yearly rests, he signed it as correct, and that in 1876 he sent to the defendant what he termed a sketch account, in which compound interest with yearly rests was calculated.

A Judge sitting in Banco adopted the finding of the jury, that no actual agreement to pay compound interest had been come to; he further came to the conclusion that both parties wrongly understood the mortgage deed as requiring the payment of compound interest, and that no agreement to pay it could be implied from the transactions between the parties, such interest having been charged by the defendant and paid by the plaintiff under a common misapprehension of their rights. He therefore gave effect to the rule of law, which was undisputed, that without such an agreement simple interest only can be charged on a mortgage account. He treated, however, the deeds which stated that £2487 12s. 2d. was due by the defendant on the 4th of January, 1869, as binding on him, and directed the master to commence the account from that day, treating the whole of that sum as principal.

The judgment of the Court in Banco was confirmed by the Court of Appeal.

It appears that the defendant insisted, independently of [* 190] the * main question, that a direction should be given that the account prior to the 11th of May, 1872, should not be reopened, contending that, even upon the assumption of there having been no agreement to vary the rate of interest under the mortgage, the account up to that time was settled, and could not be disputed. The Judge sitting in Banco declined to give such a direction, observing, "In my opinion, this is nothing more than a particular instance of that general acquiescence on the part of the plaintiff in the defendant's mode of stating the account between them with which I have already dealt; and, for the reasons already given, and on the authority already cited, his approval of the account on this occasion does not conclude him."

The same view is taken by the Court of Appeal.

On the appeal before this Board, this last is the only point now relied on, it not being contended that the settlement of account, if it were such, would not prove a contract to pay compound interest for the future.

Undoubtedly there are cases in the Courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off. *Skyring v. Greenwood*, 4 B. &

C. 281 (28 R. R. 264). But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In *Earl Beauchamp v. Winn*, L. R. 6 H. L. 234, Lord CHELMSFORD observes: "With regard to the objection, that the mistake (if any) was one of law, and that the rule '*ignorantia juris neminem excusat*,' applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well-known rule of law; and there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake."

* In *Cooper v. Phibbs*, L. R. 2 H. L. 170, Lord WEST- [*191] BURY says: "Private right of ownership is a matter of fact; it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake."

In *McCarthy v. Decaix*, 2 Russ. & My. 614, where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the LORD CHANCELLOR observes, "What he has done was in ignorance of law, possibly, of fact; but, in a case of this kind, this would be one and the same thing."

In *Livesey v. Livesey*, 3 Russ. 287, an executrix who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments.

Undoubtedly the signature by the plaintiff of the account in question, if it stood alone, unexplained, would afford a strong presumption that an agreement to substitute compound for simple interest under the mortgage had been come to, and it was for the purpose of proving the agreement which the defendant had pleaded that the account was relied upon. Their Lordships accept the finding of the jury that no such agreement was in fact made; indeed there would seem to have been no consideration for it, because, although the defendant did not exercise his power of sale as soon as he might, there is no evidence that he ever bound himself or promised to show any forbearance or indulgence to the

plaintiff. Their Lordships further agree with the Courts below, that both parties may be taken to have misunderstood the effect of the mortgage deed. This being so, there was no intention to make a change in the rate of interest — no such question was discussed or considered. The accounts were drawn up and assented to by the parties under a common mistake as to their respective rights and obligations. Their Lordships are therefore of opinion that the signature of a particular account occurring in a series of [192] accounts — all alike drawn up in error, does not prevent it being reopened upon the accounts under the mortgage being taken.

They will, therefore, humbly advise Her Majesty that the judgment appealed against be affirmed, and the appeal dismissed, with costs.

ENGLISH NOTES.

The above rule is generally applied, subject to certain exceptions, in taking the mortgage accounts in redemption and foreclosure actions; *Whotton v. Cradock* (1836), 1 Keen, 267; *Jones v. Creswicke* (1839), 9 Sim. 304.

Where, however, a sale is ordered, arrears of interest may after the confirmation of the certificate be capitalised and carry interest, but without prejudice to mesne incumbrancers: *Harris v. Harris* (1750), 3 Atk. 722; *Monkhouse v. Corporation of Bedford* (1810), 17 Ves. 380.

A further exception to this rule prevails where a puisne mortgagee pays off a prior mortgage under a foreclosure or redemption decree. Seton, 5 ed. 1609; see *Elton v. Curteis* (1881), 19 Ch. D. 49, 51 L. J. Ch. 60, 45 L. T. 435, 30 W. R. 316.

The rule appears to be excluded in the case of mortgages given to bankers to secure the balance of a current account, which by the custom of trade allows the interest to be turned into principal by successive rests so far as to bear interest on interest. *Rafford v. Bishop* (1829), 5 Russ. 346, 29 R. R. 40.

If a mortgagee enters into possession, and the rents and profits of any year are insufficient to keep down the interest, he will not be allowed to capitalise the arrears. *Proctor v. Cooper*, Prec. Ch. 116.

As regards the legality of an agreement entered into at the time of the loan for the capitalisation of interest the decisions do not appear to be altogether conclusive. As was remarked by Lord ELDON: "There is nothing unfair, or perhaps illegal, in taking a covenant originally, that, if interest is not paid at the end of the year, it shall be converted

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into principal, but this Court will not permit that, as tending to usury, though it is not usury." *Chambers v. Goldwin* (1804), 9 Ves. 254, at p. 271, 7 R. R. 184, 188.

There appears to have been an impression amongst some text-writers that since the repeal of the Usury Laws (17 & 18 Vict., c. 90), agreements made at the time for payment of compound interest would be valid. See *Day. Conv.* Vol. II. pt. II. p. 360 *n.*; *Coote on Mortgages* Vol. II. p. 945; *Seton*, 5 ed. 1609. But it has repeatedly been said that the repeal of the Usury Laws has not affected the general rule that a mortgagee is not entitled to any collateral advantage beyond his principal, interest, and costs. See *James v. Kerr* (1889), 40 Ch. D. 449 at pp. 459, 460, 58 L. J. Ch. 355, 60 L. T. 212, 39 W. R. 279. See also the judgment of Lord Justice KAY, in *Mainland v. Uppjohn* (1889), 41 Ch. D. 126, at p. 136 *et seq.*, 58 L. J. Ch. 361, 60 L. T. 614, 37 W. R. 411.

A covenant for compound interest in a mortgage of a reversionary interest was, however, upheld in *Clarkson v. Henderson* (1880), 14 Ch. D. 348, 49 L. J. Ch. 289, 43 L. T. 29, 28 W. R. 907. And stipulations of this nature in such mortgages have in other cases been allowed to pass without question. *Re Fane, Ex parte Hope* (C. A.) W. N. 1888, p. 231; *Salt v. Marquis of Northampton* (H. L.) 1892, A. C. 1, 61 L. J. Ch. 49, 65 L. T. 765, 40 W. R. 529.

It is clear that a subsequent and independent agreement for capitalisation of interest in consideration of forbearance on the part of the mortgagee is valid. *Boddam v. Reilly* (1785), 2 Bro. C. C. 2; *Brown v. Buckham* (1720), 1 P. Wms. 652; *Ex parte Bevan* (1803), 9 Ves. 223. But, as arrears of interest so converted into principal are of the nature of a further advance, they cannot be so added to principal as to prejudice puisne incumbrances after notice. *Digby v. Craggs* (1763), Amb. 612.

Arrears of interest cannot be capitalised without the consent of the mortgagor on the transfer of the mortgage. *Ashenhurst v. James* (1745), 3 Atk. 271; *Mathews v. Walwyn* (1798), 4 Ves. 118; *Chambers v. Goldwin, supra*.

AMERICAN NOTES.

In some States interest on overdue interest is allowed by statute.

The general rule is that an executory contract for compound interest may not be enforced, but the payment thereof, without oppression and intelligently, is not usurious nor invalid. *Culver v. Bigelow*, 43 Vermont, 249; *Connecticut v. Jackson*, 1 Johnson Chancery (N. Y.), 13; 7 Am. Dec. 471; *Van Benschooten v. Lawson*, 6 Johnson Chancery (N. Y.), 313; 10 Am. Dec. 333; *Stewart v. Petree*, 55 New York, 621; 14 Am. Rep. 352; *Mowry v. Bishop*, 5 Paige (N. Y. Chan.), 98.

But an agreement to pay interest on overdue interest made after it has

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accrued is enforceable. *Drury v. Wolfe*, 134 Illinois, 294; *Tylee v. Yates*, 3 Barbour (N. Y. Sup. Ct.), 222; *Fobes v. Cantfield*, 3 Ohio, 17; *Paulling v. Creagh*, 54 Alabama, 646; *Force v. Elizabeth*, 28 New Jersey Equity, 403; *Stewart v. Petree*, *supra*, disapproving Chancellor Kent's opinion in *Van Benschooten v. Lawson*, *supra*, that such an agreement could be only prospective.

In some States overdue interest becomes principal. *Cramer v. Lepper*, 26 Ohio State, 59; 20 Am. Rep. 756; *Mann v. Cross*, 9 Iowa, 327.

SECTION IV. — *Consequential Rights and Liabilities.*

No. 24. — ARNOT *v.* BISCOE.

(1748.)

RULE.

A MORTGAGOR or his solicitor who fraudulently conceals an incumbrance on the property which is known to him, is liable in equity to a subsequent mortgagee or purchaser.

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1 Ves. Sen. 95–97.

Mortgage. — Solicitor. — Incumbrance. — Liability for Non-disclosure.

[95] Attorney, on sale of an estate, not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. Though one witness cannot sustain a suit against a distinct denial by answer, the latter must be precise and positive.

The defendant Biscoe acted as an agent for the other defendant Stephens; who, wanting money, proposed to the plaintiff the sale of a leasehold estate; the plaintiff entered into articles for it, paying £500 in part, for which sum he took a bond from Stephens; but before the execution of the conveyance, the plaintiff discovered that it was incumbered with a mortgage, on which there had been a decree of foreclosure in Chancery.

Whereupon he brought a bill against Biscoe for the £500 in default of Stephens; charging that Biscoe did not disclose the incumbrance, but declared the title to be in every respect good, for which the only witness was the plaintiff's son; and it was denied by the answer of Biscoe.

LORD CHANCELLOR (LORD HARDWICKE): —

There are two considerations in this case: First, the general equity, upon which the plaintiff has brought his bill, which is not in *specie* a common equity. Secondly, the question of the fact; whether there is sufficient evidence against the defendant to enable the Court to make a decree against him, upon this principle of equity that in transacting a purchase or bargain, wherever the buyer is drawn in by misrepresentation or concealment of a material fact or circumstance, so as to be injured thereby, and that done with intention and fraud, he is entitled to satisfaction here. Which is the general principle, and is carried [96] to a particular instance; where done by any person who is attorney or agent, not only of the buyer but seller.

The general rule is true with regard to all persons having interest in the estate; and also with regard to the attorney, agent, or solicitor of the buyer; having a trust and duty with his principal; and is liable to make satisfaction, if participant in the transaction; as was partly the case of one Cant, who was employed on both sides; which often happens in purchases, although more frequently in mortgages. And if the attorney or vendor of an estate, knowing of incumbrances thereon, treats for his client in the sale thereof without disclosing them to the purchaser or contractor, knowing him a stranger thereto, but represents it so as to induce the buyer to trust his money upon it, a remedy lies against him in a Court of equity; to which principle it is necessary for the Court to adhere, to preserve integrity and fair dealing between man and man; most transactions being by the intervention of an attorney or solicitor. I distinguish greatly between this and not disclosing the general circumstances of his client, with the knowledge of which he is trusted, of which it would be improper to give notice; but otherwise when dealing for the purchase of an estate. This principle is not to be doubted in the case of vendor himself, or of a person who had interest, knowing of the transaction or purchase; which was the foundation of the decree by Lord COWPER, where a mortgage was made of an estate tail without suffering a recovery; the person who was issue or remainder in tail was clerk to the attorney, and ingrossed the conveyance without disclosing his title, though knowing of it. Upon a bill for foreclosure, when he insisted upon his title, the mortgage was made effectual against him, on this circumstance of privity; which

was held fraudulent, without any other particular fraud; although at the time of the fraud he was a minor about twenty, of such an age as that his contract would not affect him. Then the connexion between an attorney and his client cannot be a stronger excuse for him than the issue or remainder man in tail had in that case; it would otherwise be dangerous if the attorney of vendor should not disclose such incumbrances; which is not disclosing secrets, or the circumstances of his client, but what the purchaser has a right to know. This therefore is a good equity for the plaintiff against Biscoe in default of the other defendant, if it comes out so.

The next consideration is, whether there is sufficient proof to bring this within such equity.

But first, some objections must be taken notice of: that here the £500 was not advanced by the plaintiff on the credit or security of the estate; that therefore if the incumbrance was disclosed at the time of the conveyance, not of the articles, it is sufficient, which is true in some degree; but in general it is [97] fair and right that it should be disclosed at the time of the articles; for then the plaintiff might not have proceeded in his purchase; but taking it to be at the time of the execution of the articles, it must be where they are executed entirely; not where partly at the time of the articles, and part of the money then advanced; for then it was as just that the plaintiff should know of the incumbrance as it would be in general at the execution of the conveyance.

But it is objected farther that the plaintiff took a bond; but that was for farther security: if a mortgage was made of this leasehold estate, a bond would be taken; so that the taking the bond does not differ it.

As to the material fact of equity, though there is but a single witness for the plaintiff, and that to be taken with the connection between father and son, it is evidence here; though not by another law. But if this single evidence is denied by the answer, there is not sufficient to decree upon, and the bill must be dismissed, which is the rule: but the answer is not *ad idem*, the charge being positive, and the answer only to belief; which is not sufficient to contradict what is positively sworn: nor could he be convicted of perjury thereon. (1 Brown, 52; 2 Atk. 19; 3 Atk. 407, 649; 1 Vern. 161.)

On the fact, upon which I doubt, I think the evidence not clear

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enough to make a decree; but will send it to law to be tried on two issues: First, whether Biscoe, or any person concerned for him in the purchase, gave notice to the plaintiff of this incumbrance. Secondly, whether at or before the execution of the articles and bond, or either of them, the plaintiff, or any person for him, was informed thereof.

ENGLISH NOTES.

Upon the principle of the above rule, where a mortgagor concealed the existence of a legal mortgage from a purchaser for value it was held that the mortgagee was entitled to a decree of foreclosure against the purchaser, and that the latter could not avail himself of a reconveyance of the legal estate to the mortgagor which was subsequently obtained by fraud. *Heath v. Crealock* (1874), L. R. 10 Ch. 22, 44 L. J. Ch. 157, 29 L. T. 763, 23 W. R. 95.

Where a vendor of land omitted from the abstract a mortgage of which he was not aware, it was held that he must pay off the mortgage, and was not entitled to rescind the contract under a condition that, if the purchaser should insist on any requisition which the vendor should be unable or should decline to comply with, the vendor should be at liberty to rescind. *Re Jackson and Oakshott* (1880), 14 Ch. D. 851, 49 L. J. Ch. 523, 41 L. T. 719, 28 W. R. 794.

So also if third persons lend themselves to concealment of incumbrances, though without intention to defraud, they will be liable for the consequences. *Slim v. Croucher* (1860), 1 De G. F. & J. 518.

Moreover a mortgagor who conceals from a mortgagee or purchaser the existence of a prior incumbrance is liable to lose his right of redemption. By the statute 4 W. & M., c. 16, it is in effect enacted that if any person shall mortgage any lands, and again mortgage the same lands or any part thereof to another mortgagee, and shall not discover the first mortgage to the second mortgagee, he shall have no equity of redemption against the second mortgagee, who may hold the mortgaged lands free from such equity as if he had acquired them by absolute purchase.

By the statute 22 & 23 Vict. c. 35 s. 24, as amended by the statute 23 & 24 Vict., c. 38 s. 8, a mortgagor or his solicitor or agent who conceals any incumbrance or other matter affecting the title from a mortgagee or purchaser, is rendered liable to criminal proceedings as to an action for damages at the suit of the mortgagee or purchaser. This enactment does not apply to the concealment of an equitable charge which has been satisfied, or which no longer affects the title: *Smith v. Robinson* (1879), 13 Ch. D. 148, 49 L. J. Ch. 20, 41 L. T. 405, 28 W. R. 37.

No. 25. — Dixon v. Peacock, 3 Drewry, 288. — Rule.

AMERICAN NOTES.

This doctrine has no pertinency under our registry system. The case is cited in 1 Bigelow on Fraud, p. 385, on the point of the liability of an agent confederating in fraud.

No. 25. — DIXON v. PEACOCK.

(CH. 1855.)

RULE.

WHERE an estate is settled subject to a mortgage, the tenant for life is compellable by the remainderman to keep down the interest on the mortgage accruing during the period of his possession.

Dixon v. Peacock.

3 Drewry, 288-293.

Estate in Mortgage. — Tenant for Life and Remainderman. — Liability for Interest on Incumbrances.

[288] Trustees allowed a tenant for life to enter into possession, and she paid the interest of incumbrances and expended money on improvements. The trustees did not call for any account of the rents, and the evidence, both as to the income being insufficient to keep down the incumbrances, and as to the improved value of the estate, was unsatisfactory. The tenant for life purchased the property, and the trustees allowed her to deduct from the purchase money the money expended in paying interest and in improvements. *Held*, that she ought not to have been allowed these sums.

This cause came on an application, treated by arrangement as an adjourned summons, for the opinion of the Court on the Chief Clerk's certificate; and also on further directions.

The material question arose out of the following circumstances:

Mrs. Dixon, the widow of the testator in the cause, was, under his will, tenant for life of certain real estate of small amount, charged with mortgage incumbrances and legacies, and on which were some small tenements described as weavers' shops. The trustees of the will permitted the tenant for life to enter upon and manage the property, and she kept down the interest on the incumbrances and legacies, the trustees never requiring from her,

No. 25. — *Dixon v. Peacock, 3 Drewry, 288-290.*

as it appeared, any account of the amount of the income. She also, with the assent of the trustees, expended money in improving the estate, by converting the weavers' shops into respectable cottages. Some time after this, by private contract with the trustees, the tenant for life purchased the property from them, and it was then agreed that the sums expended by the tenant for life in keeping down the incumbrances and interest on the legacies, and building the cottages, should be *deducted [*289] from the purchase-money, and retained by her. On the administration of the estate in this suit, the plaintiff, the family of the testator, objected to this, and the Chief Clerk gave his opinion that these sums must be disallowed, and that the trustees were liable to replace them. The Chief Clerk's certificate had been, by inadvertence, signed by the Judge before the proper time had elapsed, so that it could not be treated as the Judge's order, and it was therefore agreed that the cause should be treated as an objection to the Chief Clerk's certificate unsigned, before the Judge, and that the question whether the certificate should be affirmed, and the further directions should be dealt with together. The reference to the Chief Clerk was, to inquire and certify how the sum admitted to be the agreed purchase-money had been applied, and under what circumstances any part of it had been allowed to be received by the widow. He certified that the sums expended by the tenant for life for keeping down the incumbrances and the improvements had been allowed to be retained by the tenant for life, and he was of opinion that they ought not to have been allowed to her.

Mr. Baily, and Mr. Busk, opened the objections.

The income of the estate was, in fact, not enough to keep down the incumbrances, and therefore the trustees were justified in allowing the interest expended by the tenant for life, *ultra* the rents, out of the *corpus*. It would be monstrous that she should have to pay out of her own pocket the interest. As to the improvements, they added to the actual value of the estate; Mrs. Dixon bought it by private contract with the trustees, and gave a larger price than it could have brought if the improvement had not been made. She would not have *given that [*290] price if the improvements had not been made. [On both these points voluminous evidence was read, the result of which, it will be seen by the judgment, was not satisfactory.]

Mr. Glasse, and Mr. W. D. Lewis, for the certificate.

The trustees ought to have seen themselves to the due administration of the estate; they let the widow take possession. It is for them to show that the sums paid by her were a proper application, before they can be allowed to charge them on the *corpus*.

Now as to the interest on the incumbrances, it was the duty of the tenant for life in possession to keep down the interest out of the rents. Much evidence is produced to show that the income was insufficient; but first, that evidence is not at all conclusive on the point; secondly, it is quite beside the question, because a tenant for life in possession must keep down the interest of incumbrances, whether the rents are sufficient or not. Then as to the sum allowed to be retained for what they call permanent improvements; firstly, the evidence is quite unsatisfactory; it does not at all conclusively show that the value of the estate was materially increased; but if it did, that would not help the case; the tenant for life has no right to charge on the *corpus* anything expended for improvements; that belongs to the inheritance, and the trustees, therefore, were wrong in allowing these sums to be retained. [They cited *Hibbert v. Cooke*, 1 Sim. & St. 552 (24 R. R. 225); *Caldecott v. Brown*, 2 Hare, 144; *Horlock v. Smith*, 17 Beav. 572.]

[* 291] *The VICE-CHANCELLOR (KINDERSLEY):—

The question now raised on the certificate is, whether certain sums ought to have been allowed to be retained by Mrs. Dixon. It is contended by the defendants, that the Chief Clerk's certificate ought to have allowed those sums. Now, what was referred to the Chief Clerk was not to say, whether the sums should be allowed or disallowed; but to inquire, how the purchase-money had been applied, and whether any portion of it had been allowed to be retained, and under what circumstances. In prosecuting that inquiry he has, by his certificate, stated how the money was applied. [His Honor then stated the effect of the certificate as to the sums allowed to be retained, and the statement in it of the Chief Clerk's opinion, that the sums ought not to have been allowed.] Now, it may be said, perhaps, that in strictness, in giving this opinion, the Chief Clerk was going beyond the reference. At the same time, as he was directed to inquire under what circumstances any portion of the purchase-money had been allowed to be retained, I can hardly say that he has gone beyond

No. 25. — *Dixon v. Peacock*, 3 *Drewry*, 291–293.

his duty. The truth is, what the defendants object to is not that an opinion is expressed questioning the certificate, but that the opinion is that the sums should be disallowed. In substance, the certificate raises a question to be dealt with on further directions; therefore, on that point, the certificate is not open to objection. It has now, therefore, to receive my approval. In strictness, after the certificate has received my approval, a certain number of days ought to elapse for either party to complain of it, and to bring it before the Judge himself; and when the Judge has determined, then either party may appeal to the Court of Appeal. [His Honor then observed that that technical difficulty *being removed by consent, the decree must be [*292] prefaced accordingly.]

I proceed now to dispose of the question on further directions. Firstly. Are these sums for interest from the death of the testator to the date of the purchase to be allowed?

Primâ facie, beyond all doubt, putting aside the question whether a tenant for life is or is not bound to keep down incumbrances whether the income is large enough or not, at least the onus lies on the trustees to show that the income was not sufficient. It does not appear that in this case the trustees took any notice of the income, to ascertain whether it was sufficient or not. Now if the trustees allowed Mrs. Dixon interest, they were bound to call her to account as to the income, which they have not done. On the evidence, I do not see any reason to suppose that the income was not sufficient; but whether it was or not, at all events, I cannot here assume that it was not. But even assuming it was not sufficient, a tenant for life can only enter into possession on the terms of keeping down the interest. If the trustees had remained in possession, and the income was not sufficient to pay the interests of incumbrances, they might, no doubt, charge it on the *corpus*. But if they let the tenant for life into possession, they can only do so on the undertaking of the tenant for life to keep down the interest. It appears to me, therefore, that on this point the Chief Clerk came to a right conclusion, and that the sums paid for interest must be disallowed.

The next question is, with respect to the sum claimed to be allowed for permanent improvements. Now the evidence on the question of the improvements is *unsatisfactory. If [*293] this were even the case of a mortgagee in possession, and

No. 25. — *Dixon v. Peacock*, 3 *Drewry*, 293. — Notes.

there were no better evidence, it does not appear to me it would be a case in which I am satisfied that the claim could be allowed. But this is not the case of a mortgagee in possession, but by a tenant for life, who enters into possession and lays out money in improving the property. Now, if any issue were to be raised here, it would be not an issue what money had been expended in improvements, but an issue to try how far the saleable value of the property was increased by them, for the tenant for life became the purchaser herself. The evidence as to value, if that issue were raised, is, in my opinion, unsatisfactory. But that question appears to me to be unnecessary, because here we have the tenant for life in possession; and if she thinks fit of her own discretion, or with the consent of the trustees, to expend money in improvements, she is not, I think, entitled to have them out of the *corpus*. On this point also, I think, therefore, that the Chief Clerk has come to a right conclusion.

ENGLISH NOTES.

It is a corollary to the doctrine that an equity of redemption is an estate in the land (see *Casborne v. Scarfe*, No. 41, p. 369, *post*), that such estate may be limited in like manner as any other equitable estate, and consequently that it may be settled subject to the mortgage.

Where an estate is so settled, the obligation of the tenant for life to keep down the interest on the mortgage exists only in favour of the remainderman or reversioner and gives no right to the mortgagee. *Re Morley*, *Morley v. Sanders* (1869), L. R. 8 Eq. 594, 38 L. J. Ch. 552.

An action against the tenant for life to compel him to apply the rents so as to keep down the interest and to answer for what has accrued, may be brought by the remainderman or reversioner: *Hayes v. Hayes* 1 Ch. Cas. 223; *Makins v. Makins* (1860), 1 De G. F. & J. 355; and a tenant for life in remainder may bring such an action. *Revel v. Watkinson* (1748), 1 Ves. Sen. 93. The persons entitled in remainder after the life estate have an equity to have the estate recouped out of the future income of the tenant for life: *Waring v. Coventry* (1834), 2 My. & K. 406; see the *dictum* of *Westbury, C.*, *contra*, in *Schofield v. Lockwood* (1863), 4 De J. & S. 22 at p. 31, *sed qu*.

It has been said that the reversion will be charged, if the reversioner stand by and allow the interest to fall into arrear. *Lord Kensington v. Bouverie* (1654), 19 Beav. 39 at p. 54. But this *dictum* has been questioned: s. c. (H. L. 1859), 7 H. L. Cas. 557, 564.

The fact that a tenant for life has an absolute power of appointment

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does not exempt him from the liability to keep down the interest: *Whitbread v. Smith* (1854), No. 16, p. 104, ante, 3 De G. M. & G. 727, 741.

If the income of the estate is insufficient to pay the interest which the tenant for life nevertheless pays, he cannot claim the excess against the remainderman unless he informs the latter of the insufficiency and of his intention to charge the inheritance. *Lord Kensington v. Bouverie supra.*

An adult tenant in tail is under no liability to keep down the interest on a mortgage, for the remainderman is regarded as wholly in his power: *Amesbury v. Brown* (1750), 1 Ves. Sen. 477; *Chaplin v. Chaplin* (1733), 3 P. Wms. 235. But if the tenant in tail keeps down the interest and dies, the remainderman and not the personal representatives of the tenant in tail will have the benefit. *Amesbury v. Brown, supra.*

An infant tenant in tail, however, cannot bar the entail and make the estate his own; and accordingly his guardians or trustees must apply the rents in keeping down the interest. *Sergison v. Sealey* (1742), 2 Atk. 412; *Burges v. Mawbey* (1823), 1 Turn. & Russ. 167, 24 R. R. 9. And the same rule applies in the case of an infant tenant in fee. *Jennings v. Looks* (1725), 2 P. Wms. 276.

AMERICAN NOTES.

This question is discussed in *Doane v. Doane*, 46 Vermont, 485; *Warley v. Warley*, 1 Bailey Equity (So. Car.), 397.

In the former it is said: "The general rule is that the tenant for life is holden in equity to pay the interest accruing during his enjoyment of the estate, and that the reversioners are holden to pay the principal," but that the life tenant may not be compelled to pay the interest; and if he does not, he forfeits his estate.

In the second it was held that the tenant for life must keep down the interest.

In 1 Washburn on Real Property, p. 96, it is said: "An important duty imposed upon every tenant for life is that of keeping down the interest upon existing incumbrances upon the estate, though as a general proposition he is not bound, as between himself and the reversioner or remainderman, to pay the principal of any money charged upon it." Supported by *Mosely v. Marshall*, 27 Barbour (N. Y. Sup. Ct.), 44; 22 New York, 202; and 4 Kent's Com. 74.

No. 26. — James v. Biou, 3 Swan. 234, 235. — Rule.

No. 26. — JAMES v. BIOU.

(CH. 1819.)

RULE.

No person shall be admitted to redeem but he who can show a title to the estate of the mortgagor.

James v. Biou.

3 Swanston, 234–241 (19 R. R. 200).

Redemption Suit. — Title to Redeem not made out. — Interlocutory Proceeding — Interim Right to Possession by Mortgagee.

[234] An order dismissing a bill for want of prosecution, obtained after an injunction had been granted restraining the defendant from proceeding in an action at law, on the plaintiff's undertaking to give judgment to be dealt with as the Court should direct, and not to bring any writ of error, was discharged; but on terms that the possession should be restored to the mortgagee pending the further proceedings in the suit.

The bill, filed on the 25th of November, 1817, stated indentures of mortgage dated the 20th and 21st of December, 1754, by which William Browne and Sarah his wife conveyed to Joseph Biou in fee, a moiety of the manor of Netherhall, and other estates in the county of Suffolk for securing the repayment of £300; and that Browne and his wife executed to Joseph Biou a subsequent mortgage of the entirety of some part of the premises, for securing the farther sum of £400.

The bill also stated that before or in the year 1781, Sewell Mansell was seized of the equity of redemption of the premises, subject to the two mortgages to Biou, which were the first charges thereon, and to subsequent incumbrances; and being in possession of the rents and profits of the premises, by indentures dated the 30th and 31st of July, 1781, conveyed them to Abel Jenkins, in trust to pay the sums of £300 and £400 with interest at the rate of 5 per centum per annum, although interest was reserved on one of the mortgages at the rate of 4 per cent. only; that Abel [* 235] Jenkins paid all interest in * arrear to the time of his death, the mortgagees not requiring payment of the principal: and by his will dated the 27th of June, 1802, devised all his real estates to the plaintiff's Charles James and David Owen,

his executors, and died leaving the plaintiff Abel Jenkins his heir.

The bill farther stated that the mortgaged premises had become vested in Susannah Biou, who was entitled to the principal of the mortgage money, and had received interest from the plaintiffs at the rate of 5 per cent. to July, 1816; prayed a reconveyance of the mortgaged premises, on payment of what was due for principal and interest, and an injunction against entering on the plaintiffs' tenants, or giving notices to them, or otherwise preventing them from paying their rents to the plaintiffs, and against bringing an ejectment.

On the 5th of December, 1817, the plaintiffs moved that upon payment into court by them of £300, and £400, the principal due on the mortgages, and £50 12s. 9d. for interest to the 20th of that month, an injunction might be issued against the defendant in the terms of the prayer of the bill. The LORD CHANCELLOR directed the motion to stand over until the time for answering had expired.

The defendant, by her answer, claiming as heiress at law and administratrix of Joseph Biou, who died intestate in 1760, and admitting the first mortgage for £300, denied that Browne and his wife executed a second mortgage for £400; stated that in July, 1759, George Keightley, by the direction of Mathews Sewell, mortgaged the other moiety of the premises to A. Maseres for £400; and in January, 1775, that mortgage was purchased by the defendant from Keightley, in whom it had become vested.

The answer further stated, that Keightley paid the interest on the mortgages as the solicitor of Sewell and * steward [* 236] of the estates, in which capacities he was succeeded by Abel Jenkins, deceased, who continued the payment of interest till his death in 1802; and from that time the plaintiffs Charles James and Abel Jenkins acted as stewards of the estates, and paid the interest; that in 1816, the defendant having applied to Jenkins for an account of the rents of the estates, Jenkins gave notice to the plaintiffs that he intended to pay the principal of her mortgage, and a correspondence ensued, Jenkins claiming to be entitled to redeem by virtue of conveyances executed by Sewell Mansell to Jenkins' father in trust to sell. The conveyances, as he alleged, directed payment of the purchase money in discharge of incumbrances, and reserved the surplus to Mansell; upon the death of Mansell intestate, his father obtained letters of adminis-

tration, and assigned his interest in his son's property to the father of Jenkins; and in 1783, the Mansell family claiming the property Serjeant Hill gave an opinion that Sewell Mansell at his death had only an equitable interest in the surplus of the money to be raised by sale of the estate, which, as a chattel interest, passed to his administrator.

The answer stated, that the title of Sewell Mansell to the equity of redemption of the estates had never been made out; that the indentures of the year 1781 were studiously concealed, and had not been acted on; and submitted that the plaintiffs ought to set out and establish their right to redeem the estate, and that the heirs or other representatives of the respective mortgagors ought to be parties to the suit; and insisted on the defendant's right to the possession of the estate, until redeemed by some person entitled to redemption.

The defendant having commenced actions of ejectment against the tenants of the premises, the plaintiffs' motion for an injunction was renewed.

[* 237] * The LORD CHANCELLOR (Lord ELDON):—

It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due, except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee. A party coming to redeem a mortgaged estate must prove, at his own costs, that he is the individual entitled to the equity of redemption. The opinion of Serjeant Hill, whom I know to have been during many years the best lawyer in the kingdom, has little application to the question now before the Court.

The LORD CHANCELLOR:—

A mortgagee may retain the mortgaged estate against every one who cannot show a title to compel redemption. The mortgages which the bill seeks to redeem are not the mortgages held by the defendant. It must be assumed that the parties making the conveyance in 1781, are the parties entitled to the equity of redemption, and I doubt whether in 1782 Jenkins could have compelled the mortgagees to permit him to redeem, and whether his trust is not much more special. The bill and the correspondence of the plaintiffs represent the beneficial interest to be in different persons.

No. 26. — *James v. Biou*, 3 Swan. 237-239.

I perfectly agree with Serjeant Hill's opinion; that the utmost interest in Sewell Mansell was a pecuniary, and not a real interest. By their correspondence the plaintiffs erroneously represent the interest to be in him and another person. Were a decree now made, ought the reconveyance to be absolute, or subject to redemption?

On the 17th of March, 1818, the LORD CHANCELLOR ordered, that upon the plaintiffs' undertaking to give *judg- [* 238] ment in the actions against the tenants to be dealt with as the Court should think fit, and not to bring any writ of error, the defendant should not proceed with them until the farther order of the Court. — Reg. Lib. A. 1817, fol. 634.

On the 11th of November, 1818, the defendant, by motion of course, obtained an order for dismissing the bill for want of prosecution. — Reg. Lib. A. 1818, fol. 6.

January 19, 1819. On this day the plaintiffs moved to discharge the order for dismissal.

Mr. Hart, and Mr. Boteler, in support of the motion.

After the order of March, 1818, for an injunction, the bill could not be dismissed by motion of course. That order was decretal, and necessarily retained the cause for the purpose of determining how the judgment given by the plaintiffs under the direction of the Court should be dealt with. By means of that order the defendant obtained judgment at an earlier period than that at which it could have been obtained in the ordinary course of proceeding at law; and this Court will not allow itself to be deprived, by a motion of course, of that jurisdiction to control the use to be made of a judgment, which was expressly reserved by the order under which it was given.

Sir Arthur Piggott, Mr. Wetherell, and Mr. Wakefield, against the motion.

No excuse had been offered for the plaintiffs' delay, of which no advantage was taken until five months after *the [* 239] time when, by the course of the Court, the bill might be dismissed without notice.

By Lord BACON's order, if the plaintiff discontinue prosecution, after all the defendants have answered, by the space of one whole term, the cause is to be dismissed of course, without any motion (Orders in Chancery, ed. Beames, 11). Since the statute of Anne (4 Anne, c. 16. s. 23) directed that, on dismissal of a bill for want

of prosecution, the plaintiff should pay full costs, the Court has indulged the plaintiff till the end of the third term, and that is now become the course of the Court in this matter (Pract. Reg. 375). If during three terms the plaintiff has taken no proceeding in the cause, his bill is subject to be dismissed by motion of course without notice. The authority on which the order is obtained is the certificate of the six clerk that no proceeding has taken place. *The Attorney-General v. Finch*, 1 Ves. & Bea. 368. Nothing, therefore, which comes not within his cognizance is a proceeding; otherwise it would be necessary to produce, in addition to his certificate, an affidavit negating the existence of interlocutory orders.

The LORD CHANCELLOR:—

Supposing that by consent an order had been made that the bill should not be dismissed, the six clerk would have no knowledge of that order.

Argument against the motion resumed.

In such a case the Court would treat the application to the six clerk as a fraud.

The LORD CHANCELLOR:—

The Court would dismiss the bill on production of the [*240] six clerk's certificate; but would the next day discharge * the order of dismissal, when informed of the order by consent.

Argument against the motion resumed.

In *Degraves v. Lane*, 15 Ves. 291, your Lordship restored the old rule, which dispenses with notice of the motion to dismiss. In *Naylor v. Taylor*, 16 Ves. 127, and in *Day v. Snee*, 3 Ves. & Bea. 170, it was expressly decided that an injunction constitutes no objection to the motion.

The only objection to a motion of this kind is some proceeding within the time limited; and no act is a proceeding which does not advance the cause to a hearing. Amendments and exceptions are proceedings, because they tend to prepare the record for the judgment of the Court. An order for an injunction before decree is interlocutory merely, and not decretal; the injunction preserves the property until the decree, but constitutes no part of the relief to be then given. The plaintiffs might have dismissed their bill by consent; and an omission to proceed during a period which by the rules of the Court renders the bill subject to be dismissed, is an implied consent to its dismissal.

The plaintiffs have suffered no prejudice by the terms of the order; the defendant might before this time have obtained judgment; and the action being commenced by special original, no writ of error could be brought.

The LORD CHANCELLOR:—

The merits of this case are not now in question; and on the present application I must assume that the order of March, 1818, was properly made, although I acknowledge my mind is not free from doubt on that point.

* The plaintiffs by their bill insist on a right to restrain [* 241] the defendant, who claims as mortgagee for two different sums, one of which passed to her by assignment, from taking possession of the mortgaged premises by means of her legal right. On the argument of the former order, I was of opinion that unless other parties were brought before the Court, the plaintiffs had not a right to redeem. It appeared to me that the defendant as mortgagee was in this situation, that she might refuse to convey the mortgaged premises to any one who was to become by that conveyance mortgagee or assignee of the mortgagee (because no mortgagee can be compelled to place another person in his stead as mortgagee), and might retain possession and refuse to reconvey, unless the persons entitled came to demand possession and reconveyance. It was never disputed that the defendant is a mere mortgagee. The mortgage and costs are tendered to her; but she refuses to accept them, and insists on holding possession against all who cannot show a title to the equity of redemption. Unless * all account against her was waived, she was entitled to [* 242] hold possession till the account had been taken.

* In March, 1818, the Court made the order on which [* 243] the plaintiffs on this occasion have relied; and it is admitted that, although that order had not been made, * the [* 244] defendant could not have moved to dismiss the bill for want of prosecution until June. The precedents which have been cited, and which were established by myself, I am anxious to follow to the utmost extent to which principle will authorise me; namely, that after an injunction has been obtained, if the plaintiff takes no step during three terms, the defendant may dismiss the bill for want of prosecution, by motion of course; although there is an order staying execution, or trial, or even sometimes the commencement of an action. In those * cases, [* 245]

on production of the six clerk's certificate, or on an assertion to which the Court gives credit that the certificate will be made, the bill is dismissed, and of course the injunction ends. The question is, whether the principle of those cases rules the present. I add only, that to what is called courtesy the Court can pay no attention; and that whatever may have been the practice of the clerks in court, notice of such a motion is not necessary. Forty years' experience authorises me to say that these courtesies occasion more delay than any other transaction in the Court.

I agree that on the motion to dismiss the bill, the Court looks no farther than the certificate of the six clerk; but if any transaction between the parties renders that motion inconsistent with justice, the Court will advert to that transaction, on an application to discharge the order. The certificate, therefore, is not conclusive on the question whether the order shall remain; and the point to be decided here is, whether the principle of those excepted [* 246] cases in which the Court *looks beyond the certificate, comprehends the present case.

It has been said that the defendant gained no advantage by the order of March, 1818; I think she gained much. Without this order she could not have obtained a judgment, on which the plaintiffs could not have brought a writ of error, nor could she have moved to dismiss the bill until June; whereas on the first day of the term ensuing the order, if judgment had not been given according to its terms, she might have moved to dissolve the injunction; and an injunction is the object of the bill. The order amounts to this, that the plaintiffs, giving judgment, shall have the benefit of all equitable considerations; and the defendant, obtaining judgment, shall not receive the fruits of it until this Court has decided whether he is entitled to them. This Court therefore assumes the right of controlling the judgment at law.

Since March, 1818, this case has been placed in circumstances quite different from those in which the Court commonly acts; from that time it was competent to the defendant, stating that judgment had not been given as ordered, to obtain the dissolution of the injunction. Call the order interlocutory or not, it is a rule of Court which alters the situation of the parties in respect to the right to dismiss the bill for want of prosecution. The principle of the cases cited in support of this motion is not applicable here;

that principle is, that a party who has obtained an injunction shall not delay the cause further than if he had not obtained it; but if the order for the injunction affords other advantages, as an undertaking not to bring a writ of error, or an early opportunity of applying to the Court, it * seems that to such a [* 247] case the ordinary rule can not be extended.

The Lord Chancellor stated that on reconsideration he retained the opinion which he had expressed, that the bill could not be dismissed on motion without notice; and intimated that he would consider the terms which should be imposed on discharging the order of November, 1818.

4 May, 1819. "His Lordship doth order, that the order made in this case, dated the 11th of November, 1818, be discharged; and it is ordered, that the defendant S. Biou do restore the possession of the premises in the pleadings mentioned to the plaintiff Abel Jenkins, undertaking to deal with such possession as the Court shall hereafter order; and it is ordered, that the said defendant do retain the rents and profits she has received, without prejudice to either side." Reg. Lib. A. 1819, fol. 1800.

ENGLISH NOTES.

The above Ruling Case clearly lays down the principle that the mortgagee is entitled to hold the property against all persons who cannot clearly establish their title to the equity of redemption. See *Lomax v. Bird* (1683), 1 Vern. 181.

So if the transaction be by way, not of mortgage, but of sale with right of repurchase within a limited time, if the condition of repurchase is not strictly complied with, the grantee's title becomes absolute, and the grantor's right of redemption is extinguished. See *Goodman v. Grierson*, No. 2, p. 6 *ante*.

So also a mortgagor who has absolutely assigned the equity of redemption cannot bring an action for redemption, but if sued by the mortgagee upon the covenant for payment of principal and interest he acquires a new right to redeem and is entitled upon paying the mortgage to the reconveyance to himself subject to any equity of redemption vested in any other person. *Kinnaird v. Trollope* (1888), 39 Ch. D. 636, 57 L. J. Ch. 965, 59 L. T. 433, 37 W. R. 234.

A mortgagee with notice of a prior equitable right may refuse to reconvey without the consent of the owner of that right. *Banks v. Whittall* (1847), 1 De G. & Sm. 542, 17 L. J. Ch. 14, 352.

It may be stated generally that the mortgagor and all persons having

any interest in the equity of redemption have a right to redeem; and the mortgagee on payment or tender cannot refuse to execute a reconveyance in which all the persons so interested concur. *Hartley v. Burton* (1868), L. R. 3 Ch. 365, 16 W. R. 876.

The following persons have been held to have an interest in the equity of redemption which entitles them to redeem:—Assignees, including puisne incumbrancers, of the equity of redemption. *Anon.* (1746), 3 Atk. 314. Devisee of the equity of redemption is entitled to redeem and need not generally make the heir at law a party. *Hall v. Dench* (1685), 1 Vern. 342; *Lewis v. Nangle* (1752), 2 Ves. Sen. 430.

A committee of a lunatic may with leave of the Court redeem and apply the lunatic's personal estate for that purpose. *Ex parte Grimstone* (1772), Amb. 706; see 53 Vict., c. 5. 117 (1).

Creditors, other than judgment creditors (as to which see *infra*), of the mortgagor. *Christian v. Field* (1842), 2 Hare 177. So also the creditors of a mortgagor if the trustee refuses to enforce their right of redemption. *Franklyn v. Fern* Barn. Ch. Rep. 30. The Crown, on escheat or forfeiture. *Attorney General v. Crofts* (1708), 4 Bro. P. C. 136. But now this right will generally be vested in the administrator or interim curator of a convict. 33 & 34 Vict., c. 23.

A dowress married since 1834 may redeem, inasmuch as by the Dower Act a married woman unless barred is entitled to dower out of equitable estates; but previously to that Act there was no such right of dower entitling her to redeem. *Dawson v. Bank of Whitehaven* (C. A. 1877), 6 Ch. D. 218, 46 L. J. Ch. 884, 37 L. T. 64, 26 W. R. 34.

The guardian of an infant may apply rents and profits in redeeming a mortgage. *Palmer v. Danby* Pre. Ch. 137.

An heir at law of an intestate may redeem. *Lloyd v. Wait* (1841), 1 Ph. 61. So the heir species in gavelkind or borough English. *Faucet v. Lowther* (1751), 2 Ves. Sen. 300. So also the customary heir of copyholds. *Ibid.*

A joint tenant or tenant in common may redeem, but must redeem the whole. *Wynne v. Styant* (1847), 2 Ph. 303, 306.

A jointress may redeem. *Howard v. Harris*, No. 39, *post*; *Smithett v. Heskeith* (1890), 44 Ch. D. 161, 59 L. J. Ch. 567.

Judgment creditors who have obtained a charge or lien upon the land of their debtor by issuing legal or equitable execution under the statute 27 & 28 Vict., c. 112 are entitled to redeem. *Mildred v. Austin* (1869), L. R. 8 Eq. 220, 17 W. R. 638, 20 L. T. 939; *Beckett v. Buckley* (1874), L. R. 17 Eq. 435. But until execution is issued they have no right to redeem. *Earl of Cork v. Russell* (1871), L. R. 13 Eq. 210, 41 L. J. Ch. 226, 26 L. T. 230.

Legal personal representatives might always and may now redeem

No. 26. — James v. Biou. — Notes.

mortgages of leaseholds or other personalty; but if the mortgage is of realty the personal representatives of the mortgagor have no right independently of statute to redeem, whether the mortgage is in fee or for a term. *Fray v. Drew* (1865), 11 Jur. (N. S.) 130; *Cutley v. Sampson* (1864), 33 Beav. 551. But now it seems that the personal representatives of the owner of an equity of redemption in real estate have such an interest as will entitle them to redeem. 60 & 61 Vict., c. 65 s. 1.

Mortgagees of the equity of redemption may redeem prior mortgages, but they must make the mortgagor a party in order to foreclose him. *Fell v. Brown* (1787), 2 Bro. C. C. 276; *Rhodes v. Buckland* (1852), 16 Beav. 212.

The mortgagee of an estate for life may redeem a mortgage in fee on the settled property. *Ryley v. Croydon* (1862), 2 Dr. & Sm. 293.

A partial interest gives a right to redeem; but the conveyance should reserve the rights of the other persons interested: *Pearce v. Morris* (1869), L. R. 5 Ch. 227, 39 L. J. Ch. 342, 21 L. T. 190, 19 W. R. 196.

A sequestrator may redeem. *Fawcett v. Fothergill* (1702), 1 Dick. 19.

A surety for the mortgagor is entitled to redeem by reason of his right to pay off the debt and to stand in the place of his principal. *Green v. Wynn* (1869), L. R. 4 Ch. 204, 38 L. J. Ch. 220, 20 L. T. 131, 17 W. R. 385.

A tenant by the Custom may redeem. *Jones v. Meredith* (1739), Bunb. 346.

A tenant for life of settled property may redeem, whether his estate be legal or equitable. *Earl of Kinnoul v. Money* (1767), 3 Swanst. 202, 219 n. But he must hold the equity of redemption subject to the trusts of the settlement. *Wicks v. Scrivens* (1860), 1 J. & H. 215.

A tenant for years may redeem though holding under an agreement for a lease which the mortgagee refused to adopt. *Tarn v. Turner* (C. A. 1888), 39 Ch. D. 456, 57 L. J. Ch. 1085, 59 L. T. 742, 37 W. R. 276.

A tenant in tail or other remainderman may redeem. *Playford v. Playford* (1845), 4 Hare, 546.

A trustee of a bankrupt is entitled to redeem. *Franklyn v. Fern Barn*. Ch. Rep. 30. So also the trustee of a creditor's deed made by the mortgagor. *Smith v. Baker* (1842), 1 Y. & Col. C. C. 223, 230.

Volunteers claiming under the mortgagor may redeem. *Howard v. Harris*, *supra*.

AMERICAN NOTES.

Any party in interest may redeem. As part owner of the equity of redemption: *Taylor v. Porter*, 7 Massachusetts, 355. Assignee: *White v. Bond*, 16 Massachusetts, 400. Guardian: *Hubbard v. A. M. D. Co.*, 20 Vermont, 402.

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Surety paying debt: *Averill v. Taylor*, 8 New York, 44. Judgment creditor of mortgagor: *Brainard v. Cooper*, 10 New York, 356; *Schuck v. Gerlach*, 101 Illinois, 338; *Lehman v. Collins*, 69 Alabama, 127. Attachment creditor: *Bridgeport v. Blinn*, 43 Connecticut, 274. Owner of homestead interest: *Butts v. Broughton*, 72 Alabama, 294. Owner of dower interest: *Denton v. Nanny*, 8 Barbour (N. Y. Sup. Ct.), 618. Of leasehold: *Averill v. Taylor*, *supra*. Of easement: *Bacon v. Bowdoin*, 22 Pickering (Mass.), 401. Tenant for life: *Lamson v. Drake*, 105 Massachusetts, 564. For years: *Hamilton v. Dobbs*, 19 New Jersey Equity, 227. Junior mortgagee: *Ellsworth v. Lockwood*, 42 New York, 89; *Rogers v. Herron*, 92 Illinois, 583; *Sager v. Tupper*, 35 Michigan, 134; *Hasselman v. McKernan*, 50 Indiana, 441; *Renard v. Brown*, 7 Nebraska, 449; *Manning v. Markel*, 19 Iowa, 103; *Scott v. Henry*, 13 Arkansas, 112; *Wiley v. Ewing*, 47 Alabama, 418. In short, any person having a legal interest subsequent to the mortgagee's: *Averill v. Taylor*, *supra*; *Platt v. Squire*, 12 Metcalf (Mass.), 494; *Austin v. Bailey*, 64 Vermont, 367; 33 Am. St. Rep. 932. But not the holder of a mere equitable title: *Grant v. Duane*, 9 Johnson (N. Y.), 591; *McDougal v. Capron*, 7 Gray (Mass.), 278. See *McCormick v. Knox*, 105 United States, 122; 2 Story's Eq. Jur., sect. 1023; 3 Pomeroy's Eq. Jur., sect. 1220, and notes.

As a general rule the mortgagee is not compellable to assign, but only to discharge the mortgage, upon payment. *Lamb v. Montague*, 112 Massachusetts, 352; *McCulla v. Beadleston*, 17 Rhode Island, 20; *Bigelow v. Cassidy*, 26 New Jersey Equity, 557; *Gatewood v. Gatewood*, 75 Virginia, 407; *Holland v. Citizens' Sav. Bk.* 16 Rhode Island, 734; 8 Lawyers' Reports Annotated, 553.

But in some States the party redeeming is entitled to delivery of the mortgage to him uncanceled, which operates as an equitable assignment. *Hamilton v. Dobbs*, 19 New Jersey Equity, 227; *Mattison v. Marks*, 31 Michigan, 421; *Holland v. Citizens' Sav. Bk.* 16 Rhode Island, 734.

And in some States an assignment is compellable for the protection of one not primarily liable to pay the mortgage. *Twombly v. Cassidy*, 82 New York, 155; *Lamb v. Jeffrey*, 41 Michigan, 719; *Grant v. Parsons*, 67 Iowa, 31.

No. 27. — DUKE OF ANCASTER v. MAYER.

(CH. 1785.)

RULE.

INDEPENDENTLY of statute, the general personal estate of a testator or intestate is presumably liable to the payment of his mortgage debts in exoneration of the mortgaged property, unless, in the case of a testator, sufficient evidence of contrary intention appears by his will.

Duke of Ancaster v. Mayer and others.

1 Brown's Ch. Cas. 454-467.

Equity of Redemption. — Deceased Owner. — Liability of Estate.

Notwithstanding a charge upon a term for payment of debts, a lease- [454]
hold estate purchased by the testator, subject to a mortgage, shall bear
the burden of that mortgage, it not being properly the debt of the testator.

Charles Bertie made his will, dated the 9th of November, 1759, and thereby devised as follows: "I give and devise to Thomas Noel and John Mayer, their executors, administrators, and assigns, all those my manors, lands, &c., in Lincolnshire, to have and to hold to them, from the time of my decease for the term of ninety-nine years, upon the trusts hereinafter-mentioned." He then gave the real estate, subject to the term, and in default of issue of his own body, to Montague Bertie for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life; remainder to his first and other sons in tail male, with remainders over, and afterwards declared as follows: "I do hereby declare that the term and estate so as aforesaid limited to them the said Thomas Noel and John Mayer, their executors, administrators, and assigns, for ninety-nine years, is upon the special trust and confidence, and to the intents and purposes following; that is to say, upon trust and confidence that they the said Thomas Noel and John Mayer, their executors, &c., shall out of the rents and profits, or by mortgage, assignment, or demise of all or any part of my before-mentioned manors, &c., or any of them, for all or any part of the said term of ninety-nine years or otherwise, as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to pay and satisfy all the debts I shall owe at the time of my decease, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and * apply the same accordingly. [*455] And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine." He then devised as follows: "I give and devise to my brother Montague Bertie, his executors and administrators, all that the manor of East and West Deeping

holden by lease from the Crown, subject to the yearly rent and covenants reserved in the said lease, and also subject to the mortgage thereon, to Mrs. Millicent Neate, of London, for £6500; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances, subject as aforesaid, to such person as shall be entitled to the freehold of my real estate at the time of my decease by virtue of the aforesaid limitations in this my will." And towards the end of his will he devised as follows: "*Item*, — I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever and wheresoever, unto my said brother Montague Bertie; if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate under and by virtue of the limitations in this my will: Provided always, and I do hereby declare my mind and will to be, that in case I shall at the time of my death leave issue of my own body, that then and in such case, as well all and every the before-mentioned uses, devises, and limitations to my said brother Montague Bertie, the Duke of Ancaster, and their respective heirs, and also the devise of the residue of my personal estate, shall be utterly void; and in such case I do hereby will, and my mind is, that all my real estate, subject to the said term of ninety-nine years, shall descend according to the rules of law, and that the residue of my personal estate shall go and be distributed in such manner, and to and among such persons as if I had died intestate. And I do hereby nominate and appoint the said Thomas Noel and John Mayer executors of my last will; and I do hereby will, order, direct, and appoint, that my said executors and the survivor of them shall and do pay, satisfy, and discharge my funeral charges, and all my debts and legacies as soon as they shall become due and payable, by such methods, ways, and means, and in such manner as he or they, or their counsel [456] learned in the law, shall in that behalf advise and think meet; and it shall and may be lawful to my said executors, or either of them, to deduct and satisfy to him or themselves out of my personal estate, or out of the moneys to be raised out of the said term of ninety-nine years before to them devised, all such disbursements, expenses, and charges which they or either of them shall be put to in proving this my will, or by any other ways or

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means whatsoever in or about the execution of this my will, &c." Montague Bertie died in the lifetime of the testator, and the plaintiff became entitled, under the limitations in the will, to the real estate. The leasehold estate had been several years before mortgaged by the testator's father for £6500 to Mrs. Neate, and in 1765 the mortgage was assigned by the desire of the testator to Sir Thomas Palmer, who advanced the testator a further sum of £100 on it, and the testator conveyed other estates as an additional security for the £6600.

This cause was first heard before the late Lords Commissioners (Lords ASHURST and HOTHAM).

Mr. Mansfield, Mr. Madocks, and Mr. Kenyon, for the plaintiffs. There are three questions in this case. First, Whether the personal estate is exonerated of the debts. Secondly, Whether the mortgaged estate is liable to the mortgage. Thirdly, What interest the Duke takes in the personal estate. As to the first, although the personal estate be the original fund for the payment of debts, yet the testator may discharge it against the devisee of his real estate; and if his intent so to discharge it appears upon the face of the will, that intention shall govern. Here he has created a term for the payment of his debts, which sufficiently points out his intention. The cases show that an intention so demonstrated is sufficient. *Bampfild v. Wyndham*, Pre. Ch. 101, the testator providing a real fund for the payment of his debts, and giving his personalty to his wife, it was held she should take it exonerated from the debts. *Wainwright v. Bendlores*, 2 Vern. 718, devise for payment of debts and the personalty held exempt. In *Walker v. Jackson*, 2 Atk. 624, the personal estate was held to be a specific legacy, and of course exonerated. *Auderton v. Cook*, 4th June, 1775, Thomas Calendar gave several specific parts of his personal estate; he then gave part of his real estate in strict settlement, and devised the remainder of his real estate to trustees in trust to sell for the payment [457] of debts; and in case that should not be sufficient to discharge the debts he charged the deficiency on the devised real estates. He then gave the residue of his personal estate, not before bequeathed, to his wife. The Court held she took it wholly exempt from the debts. In *Stapleton v. Colville*, For. 202, in *Holliday v. Bowman*, before Lord BATHURST (1 Bro. C. C. 145), *Kynaston v. Kynaston*, and *Glede v. Glede*, the same doctrine has

been held. Secondly, the second point is, whether the mortgage shall also be discharged by the real estate. This point is determined by the case of *Serle v. St. Eloy*, 2 P. Wms. 386, which is recognised in *Galton v. Hancock*, 2 Atk. 437. Thirdly, the last question is what interest the Duke shall take. He claims under the description of the person who should come into possession, and must take the same interest that Montague Bertie would have taken, that is the absolute interest.

Mr. Selwyn, Mr. Arden, and Mr. Aigne, for the defendants. As to the last question, we contend that the Duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, with respect to the second, that the mortgaged premises must bear their own burden. As to the other, which is the principal question, it depends on the several clauses in the will. The first clause creates the term. The next, which is material, is that by which he gives the personal estate. The third, that appointing the executors, and directing them to pay the debts by such means as they should think meet. In this case there is no specific bequest of the personal estate. If he had meant the executors shall pay the debts out of the term he would not have left it in their option how they should pay them. In order to exonerate personal estates from the payment of debts there must be an express direction that they shall be paid out of some other fund, or something tantamount to such express direction; but here is no necessary implication that the fund should be exempt. In *Bampfild v. Wgadham*, [458] the debts were more than the amount of the personal estate. In *Wainwright v. Bendlowes*, the estate was ordered to be sold out and out. In *Bromhall v. Wilbraham*, at the Rolls November, 1734, the testator gave all his personal estate to his sister, whom he made executrix; he gave all his real estate to his brother, charged with his debts; but the personal estate was held to be first liable. In the case of *Lord Inchiquin v. O'Brien*, 1 Wils. 82, 1 Cox. 1, before Lord HARDWICKE, the Earl of Thomond by his will directed that all his debts should be paid; he devised his real estate to Lord Inchiquin and another in trust, that they should make sale of a sufficient part of the estate, and out of the money arising therefrom, together with the rents and profits, should in the first place pay all the debts which he should owe at the time of his death, and his legacies, and subject thereto he

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limited his real estate over; he gave Sir William Wyndham £20,000, and some other legacies; then followed these words: "and this further will was, that the whole money to be raised by such sale should be taken as part of his personal estate." Lastly, he gave the rest and residue of his personal estate, whatsoever, after payment of his debts, to the defendant. The personal estate was first applied. In *Fereyes v. Robinson*, Bunb. 301, the same doctrine was laid down, because, as the Court observed, there were no negative words to exonerate the personal estate. In *Stephenson v. Heathcote*, 1 Eden. 38, Harper devised lands to trustees in trust by sale or mortgage to raise so much money as would pay all his debts and funeral expenses; he then gave a silver tobacco-box to A. B., and gave all the residue of his personal estate to his wife, and made her executrix. Lord NORTHINGTON ordered the personal estate to be first applied.

Lord Commissioner ASHHURST delivered the opinion of himself and Lord Commissioner HOTHAM.

The first question is, whether under the will of Charles Bertie the plaintiff is entitled to the personal estate discharged of the debts. Secondly, whether the personal estate is the fund out of which the mortgages are to be paid. Thirdly, what estate the plaintiff takes in the freehold and personal estate. The main question is, whether the plaintiff is entitled to the personal estate discharged of the debts. The cases are determined on different grounds. *Adams v. Meyrick*, Eq. Ab. 271, which is in favour of the plaintiff, made the ground that the testator said that the trustees do and shall, by mortgage, &c., pay. This [459] is a very loose ground, and has been since abandoned.

Fereyes v. Robinson, in Bunb. 301, is the most sensible case. In *Walker v. Jackson*, 2 Atk. 624, Lord HARDWICKE says the general rule is that the personal estate shall be first applied; but that against his devisee the testator may charge his real estate instead of his personal. The personal estate must be first applied, unless there are express words or a plain intent to the contrary. The only question in every case of this kind is, whether you can satisfactorily find out whether the testator meant to exempt the personal estate from the debts, for there are no technical words by which it is to be done. In this case, if it depended on the two clauses in the will, the intent could not be doubted, the trustees are to raise sufficient to pay all the debts. The next thing to be con-

sidered is, whether there is anything in the latter part of the will to overturn this apparent intent. It seems highly probable the word "residue" was thrown in without any meaning, or to give an option to the trustees out of which fund to take their expenses, and that they might not be in advance. At all events it excludes the idea that the charge was to fall upon the personalty. The more modern authorities have gone in exclusion of the personalty upon much less reason. *Anderton v. Cooke*, *Holliday v. Bowman*. We think the Duke of Ancaster is entitled to the personal estate exempt from payment of debts. The next question is, whether it should be charged with the mortgages, and as to this point we are bound by the cases of *Serle v. St. Eloy*, 2 P. Wms. 386, and *Galton v. Hancock*, 2 Atk. 424, to decree that the mortgage must be paid out of the devised estate. The third question is, what interest the Duke takes in the personalty. He took an absolute one, there is no need of express words for this purpose; it is beyond a doubt Montague Bertie would have taken absolutely; then, where the testator gives it by the description of the person entitled to the freehold, he does not state the interest so given to be a less interest than that of Montague Bertie.

A petition was presented for a rehearing, which came on before Lord THURLOW the 16th of June, 1784. The arguments used and the cases cited were a recapitulation of those before the Lords Commissioners.

[460] LORD CHANCELLOR (Lord THURLOW). — It would be highly advantageous to property if there was a settled rule where the personalty shall be applied to the payment of debts and where it shall be exempted from them. One step has been taken toward such a rule, by its being laid down that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied. The question that next arises is, whether, a real estate being charged and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary I have always understood, that in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the pur-

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pose. I therefore take the rule *in primis* to be, that neither the charge of the debts upon the real estate, or the gift of the personal, is sufficient of itself to exempt it. But it is indubitably true that express words are not necessary to exempt the personal estate. The question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption; it must arise from the context of the will; but with great deference to the opinion which has been given, I think there is not sufficient in this will. After devising his real estate the testator takes up the term, he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts. He gives his leasehold estate to Montague Bertie, but without any predilection, for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term, which are to raise money to pay his debts and legacies, and after raising them the term is to cease. He then disposes the rest of his personal estate. He afterwards determines what shall be done with the personal estate in case he should have issue. In the provision which he superadds he takes notice of the devise of the personalty, and calls it a residue, by which he means the devise of the personal estate after the specific [461] bequest. He provides then that if he should die, leaving issue, the dispositions he had made should fail: this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees; so that it is given them in the character of executors. It is also material to observe, that in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question then is, whether any inference is to be drawn that he meant it should go with the burden the law throws upon it, or it is to be presumed that it should be exonerated for the purpose of throwing that burden upon the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burden. By chance he has gone farther, for where he has given directions for the indemnity

of his executors he has directed the expenses to be taken out of either the personal or real estate. He has in that clause arranged the estates as the law would arrange them; which affords an inference that he meant the real estate only to be in aid of the personal; I should therefore think, if the rule were that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so; but I take the general rule to be the other way. I should have no doubt on the intention of the testator in this respect if there were not another point, which I think ought to undergo a further inquiry. I mean the mortgage of the leasehold estate. The case of *Serle v. St. Eloy* went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but in the present case the debt of the father falls upon the estate in two ways, partly as being a charge, and partly as a debt upon the personal estate. It must be [462] referred to the Master to consider the circumstances of the debt of £6000, and the estate on which it was secured; and as that point must stand over, I shall think it no impediment to the justice of the Court to defer the decree upon the other point also.

The Master having made his report that the £6000 was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer, the cause was again set down for argument the 4th July, 1785, and then stood for judgment till the next day, when the LORD CHANCELLOR pronounced his decree.

LORD CHANCELLOR. — Whether the personal estate should be liable, in the first instance, in exoneration of the real estate to the payment of debts in wills of this kind, upon looking into the cases, I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that could the will of a testator be referred to a number of lawyers they would probably entertain a diversity of opinions upon it. The point ought to be fixed; and in order to make it so, I take it

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the rules have been these, and should be adhered to: in the first place, that the personal estate is liable in the first instance to the payment of the debts, but (in exception to this) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts; and then it becomes a question what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule laid down in *Fereges v. Robinson*, that the testator must use express words for that purpose, but it is impossible to abide by the opinion given in that case consistently with the rules in other cases. The second rule is, that where there is a declaration plain, that shall stand in lieu of express words: this rule has been laid down so long, and acted upon so constantly, that if other Judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore if there be a declaration plain, or manifestation clear, so that it is apparent upon the face of the [463] will that there is such a plain intention, the rule then is not to disappoint but to carry such intent into execution. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts. In regard then to the general intention of the will of Charles Bertie: the testator was seised of a real estate, which he had in his contemplation, (exclusive of the idea of his own children), and wished to leave it to other lines of the family of Bertie, and consequently devised it to Montague Bertie, with remainder over to Peregrine Bertie for life, &c. So far in respect of the real estate his intention was to fix it in the name and blood of the family. The next object he had in view was a leasehold estate which he held under the Crown; that estate was a chattel interest, and with regard to that he does not show such a wish to fix and continue that estate in the line of Bertie. His apparent wish was not so strong as in respect to the disposal of his real estate; for had it been so, though he could not have created an entail of this leasehold estate with limitations over, yet he might have presented the first taker of it from alienating it. Had the testator been asked the question

whether he meant that this part of his estate should be subject to the mortgage, or to give it entire to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other estate, this might have been a very doubtful question, and merely conjectural, though perhaps he might have answered, that that estate should pay the debts; but whatever his intention was, he has positively given it subject to the payment of the debt; therefore if another estate had been appropriated to payment of his debts, and this had been his debt upon the estate, I should have concurred with the Lords Commissioners: but in following them in that course, in which they considered it as being the clear intention in the mind of the testator that the real estate should be so appropriated, I rather think otherwise: for it appears to me as if the testator wished it should not, and that he chose that the leasehold estate should be so appropriated rather than to have burdened the real estate. For the mode of limiting the estate to Montague Bertie for life implies the intention of giving him a personal bounty, but in case of failure of issue he gives it to the next heir who should come into possession, &c. Had the [464] real estate been expressly charged with payment of the debts, or the testator shown an anxious intention to have sacrificed his real estate in preference to the leasehold or his other estate for that purpose, by the mode of disposing of his estates, such a circumstance might have been sufficient to have turned the rule of law, and it must have been appropriated to the payment of debts, let him have charged it in any manner he pleased. When the testator purchased this leasehold estate he purchased the equity of redemption; and the mortgage was to be considered merely as a real incumbrance upon the estate itself, and not a personal debt, as against the purchaser, according to the rules of this Court and cases decided. For if a man purchases an equity of redemption subject to incumbrances, that shall be real incumbrance following the land and not a personal one. The question is, whether by purchasing this estate, and assigning the mortgage from Mrs. Neate to Hoare, and covenanting for payment of debts, he did not make it his own debt. Had *Ecclyn v. Ecclyn* (2 P. Wms. 659) never been decided, a fair argument might have arisen upon that head: because where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law, he makes it his own debt, and makes himself liable to be

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sued upon that covenant, and such a debt has priority before other simple contract debts. Now I do not know in what Court or by what rule the debt would have followed the purchaser personally; but *Evelyn v. Evelyn* has decided, that though he might be at law liable, yet where there are real assets sufficient for the payment of the incumbrance, they shall be applied for that purpose; and it is to be understood with respect to such transaction, that the party did it by way of accommodating the charge, and not of making the debt his own. The difference between the estate descended and purchased is nothing, unless the circumstance of purchasing creates the difference; but that affords no argument. The next question is, whether when he mortgages an estate of his own as an ulterior security, that circumstance would create a difference, as if, in *Evelyn v. Evelyn*, an additional real fund had been secured for making the debt good, that would have turned the judgment; it would not: for nothing makes it his debt so effectually as the covenant to pay, for it does not create the debt, but only operates as collateral to the debt: a man mortgages his estate without covenant, yet because the money was borrowed the mortgagee becomes a simple-contract creditor, and in that case [465] the mortgage is a collateral security, and if there is a bond or a covenant then there is a collateral security of a higher species, but no higher by means of the mortgage merely; therefore having such security amounts to nothing; and I have no doubt but that if the case had been stated to the Lords Commissioners, namely, that this incumbrance was not one of the testator's debts and did not fall upon the personal estate, that they would have considered it as inherent to the leasehold estate. The argument of its not falling upon the testator, answers his real intention better. But as to the real intention, I should have agreed with the Lords Commissioners could that intention have been made clear; but the intention does not amount to a declaration plain in any sense in which these words have been properly applied. For the purpose of securing property, and the due administration of justice in a free country, Judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment without applying to a superior tribunal. It is a fixed rule that the personal estate must be first liable, unless another fund is provided; the testator must express his intention to discharge that estate from the payment of debts. With regard to the intention

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apparent upon this will, it is said such intention is most anxiously limited to the raising of the term of ninety-nine years; whether the expression be more or less, it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burdened his real estate in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a declaration plain, I should not have changed the force of those words; but the intent of these words as they stand naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a degree of inference; but constructions thus picked up, and collected from more circumstances than are necessary for the purpose, are not good ways of finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favourable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay not only the expense of the probate of the will, which is expressly mentioned, but to pay all the charges and expenses that should arise by proving the will, or by any other means, &c. How are these [466] to be paid? out of the personal estate? or the means to be raised out of the term of ninety-nine years? They have authority to pay the whole out of the personal estate: an optional cause, and empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law would have done; he has made his personal estate first liable and then the term. The true ground upon which I proceed is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration which would tend, in law, to the purpose of preserving the personal estate for any given purpose whatever. As to *Adams v. Meyrick*, that depended upon the circumstance of the personal estate being a provision for the wife; and therefore the Court forced a construction upon the will, and it is, as Lord HARDWICKE termed it in *Walker v. Jackson*, 2 Atk. 624, a weak case: in the latter case the re-publication of the will was an argument much relied upon. As to the cases determined upon the words "rest and residue," I could have wished his Lordship had decided upon them all, so as to have left a particular note upon each of them; for such determi-

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nations as those cases afford have occasioned great perplexity upon the rule of law. As to *Stapleton v. Colville*, in that case the wife was executrix, and, exclusive of the context of the will, with regard to the option given to her to charge either fund, there never was a stronger case against charging the real estate: for he gives the whole real estate to the wife, and to be charged with debts; he wishes the continuance in his name and family, and yet charges it with the payment of the debts. Lord TALBOT observed much might arise from the examination as to the *quantum* of the debts and the amount of the personal estate. Lord TALBOT took it as clear that such an examination could be gone into.¹ In *Stephenson v. Heathcote*, it is said expressly no examination can be had. In that case Lord Keeper HENLEY relied much upon the wife being executrix: the case was this, that the testator gave all his real estate to R. and his wife forever, with a charge thereon for payment of debts; and after disposing of other property, he gives a silver tobacco-box to his uncle, and all the residue he gives to his wife forever, whom he appointed sole executrix. [467] LORD KEEPER's observation upon this case was, that the intent of the testator was to be collected from the words of the will and from no circumstances out of it, and upon general principles and rules established in the cases, that the Court could not go into the testator's circumstances, as it would establish a rule not to be adhered to. The testator intended to charge his personal estate with payment of his debts, and only made his real estate an auxiliary fund; according to the rule of law, where the intent of the testator is plain, or words tantamount to express words, that is sufficient to take it out of the rule; and that it could not be the intention; for the last clause, of giving the silver tobacco-box, and then the residue to his wife, is not sufficient to show his intention to give the residue free from debts, but that the primary fund should be liable.

In the present case I am obliged to differ from the Lords Commissioners, and consider the whole personal estate as liable to the payment of the debts; and with respect to the leasehold estate, that the charge under which it came to the testator was prior to his purchasing it and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt.

The judgment Ex relatione.

¹ So said by Lord HARDWICKE in *Lord Inchiquin v. French*, Amb. 40.

ENGLISH NOTES.

As between the persons claiming the estate of a mortgagor on his death, the ruling case of *King v. King*, No. 1, p. 1 *ante*, established the rule that the general personal estate of a deceased mortgagor, whether the mortgage deed contained a covenant for payment or not, was primarily liable to payment of the mortgage debt in exoneration of real estate comprised in the mortgage, unless a contrary intention could be gathered expressly or by plain implication from the language of the mortgagor's will. This question was decided only by an examination of the will taken as a whole, and extrinsic evidence was not admissible to show the testator's intention. And the decision in *Duke of Ancaster v. Mayer*, above stated, extends the application of this rule to mortgaged personalty, so as to entitle the legatee of a specific chattel to be exonerated at the expense of the general personal estate.

In the absence of sufficient indications of the mortgagor's intention to the contrary, the rule, as regards real estate, was of general application, and prevailed whether the lands in mortgage devolved on the heir at law: *Howell v. Price* (1715), 1 P. Wms. 292; or on a general devisee: *Galton v. Hancock* (1744), 2 Atk. 430; or on a particular devisee. *Packley v. Packley* (1681), 1 Vern. 36; *Johnson v. Milksopp* (1689), 2 Vern. 112.

The general rule above stated, however, was founded entirely on the principle that the creation of a mortgage upon specific property by its owner benefited the general personal estate, which ought accordingly to bear the burden. And therefore, if the principle did not apply in a particular case, the application of the rule to that case was excluded.

If then the mortgage was not created by the testator or intestate ancestor himself, but the estate came to him by devise or descent incumbered by an "ancestral mortgage" created by a prior owner, then, inasmuch as the personal estate of the person so taking was not benefited by the mortgage, there was no ground for the application of the general rule, which accordingly did not apply. *Scott v. Beecher* (1820), 5 Madd. 96; *Hickling v. Boyer* (1851), 3 Mac. & G. 635, 644.

A devisee or heir might however adopt an ancestral mortgage debt and rank it his own by some act showing sufficient evidence of intention so to do, in which case his general personal estate would become primarily liable to discharge the debt in exoneration of the mortgaged property. *Barham v. Earl of Thanet* (1834), 3 My. & K. 607.

The operation of the rule might always be excluded by contrary intention expressed by the mortgagor's will or to be gathered by plain implication therefrom. *Morrow v. Bash* (1785), 1 Cox, 185; *Forrest v. Prescott* (1870), L. R. 10 Eq. 545, 10 W. R. 1065.

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In order to deprive the heir or devisee of his right to exoneration out of the personality, it was not sufficient for the mortgagor to charge by will his real estate with payment of his debts; he must have shown an intention to exempt his personal estate. *Dolman v. Smith*, Pre. Ch. 456; *Bootle v. Blundell* (1815), 1 Mer. 193, 15 R. R. 93; *Darius v. Ashford* (1842), 15 Sim. 42.

A devisee was entitled to exoneration even where the mortgaged lands were devised to him subject to a specific mortgage, or to encumbrances generally, the words being deemed to be merely descriptive of the state of the property, and not to indicate an intention to charge the lands in exoneration of the personality. *Serle v. St. Eloy* (1726), 2 P. Wms. 386; *Duke of Ancaster v. Mayer*, *supra*.

The effect of Locke King's Act (17 & 18 Vict., c. 113), and of the Amending Acts (30 & 31 Vict., c. 69; 40 & 41 Vict., c. 34) has been to reverse the former rule as regards the estates of persons who died on or after the 1st of January, 1855, and to make the mortgaged lands, whether freehold, copyhold, or leasehold, primarily liable, as between them and the personal estate, to payment of the mortgage debt, in the absence of contrary intention indicated by the will of a deceased mortgagor taken as a whole.

By section 1 of the Real Estate Charges Act, 1854 (17 & 18 Vict., c. 113), commonly known as Locke King's Act, it is in effect enacted that where a mortgagor dying after the 31st December, 1854, shall not by his will or deed or other document have signified any contrary or other intention, the heir or devisee to whom the mortgaged lands shall descend or devise shall not be entitled to have the mortgaged debt discharged or satisfied out of the personal estate or other real estate, but the land so charged shall, as between the different persons claiming through or under the deceased persons, be primarily liable.

By an Amending Act (30 & 31 Vict., c. 69), it was in effect enacted that in construing wills for the purposes of this Act, a general direction for payment of debts out of personality is not to include mortgage debts unless such intention is expressed or necessarily to be implied from the will. See *Re Newmarch*, *Newmarch v. Storr* (C. A. 1878), 9 Ch. D. 12, 48 L. J. Ch. 28, 39 L. T. 146, 27 W. R. 104. And by the same Act the term "mortgage" is to include a lien for unpaid purchase money of land purchased by a testator.

By another Amending Act (40 & 41 Vict., c. 34) leaseholds were brought within the operation of Locke King's Act as regards the estates of persons dying on or after the 1st January, 1878. The intention to exclude the operation of these Acts must be collected from the will, deed, or other document taken as a whole. See *Eno v. Tatham* (1863), 3 De G. J. & S. 443; 9 Jur. (N. S.) 481; *Coote v. Lowndes*

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(1870), L. R. 10 Eq. 376, 39 L. J. Ch. 887; *Elliott v. Dearsley* (C. A. 1880) 2 R. C. 234 (16 Ch. D. 322, 44 L. T. 198, 29 W. R. 494); *Re Boards, Knight v. Knight* (1895), 1 Ch. 499, 64 L. J. Ch. 305, 72 L. T. 220, 43 W. R. 472.

AMERICAN NOTES.

This case is cited and the principle is approved in 2 Washburn on Real Property, p. 206, where it is said: "In general it may be assumed, where there is no specific legislation on the subject, that an heir at law of a mortgagor may call upon the executor or administrator to discharge the mortgage upon the real out of the personal estate, on the ground that the personal estate had the benefit of the money for which the security was given." So as to a widow's dower as against a purchase-money mortgage. *Henagan v. Harlee*, 10 Richardson Eq. (So. Car.), 285. And so as to a devisee: *Goodburn v. Stevens*, 1 Maryland Ch. 420; *Crowell v. Hospital*, 27 New Jersey Eq. 650, 653; *Cumberland v. Codrington*, 3 Johnson Ch. (N. Y.), 229; even though the real estate be devised subject to payment of debts: *Lupton v. Lupton*, 2 Johnson Ch. (N. Y.), 614. (The rule is otherwise in New York by statute. *Wright v. Holbrook*, 32 New York, 587.)

But the principle does not apply against legatees nor creditors: *Torr's Estate*, 2 Rawle (Penn.), 250; nor the holder of the mortgage: *Trustees v. Dickson*, 1 Freeman Eq. (Mississippi), 474; *Patton v. Page*, 4 Henning & Munford (Virginia), 449; nor where there is a direction to sell the lands to pay debts and the personality is expressly bequeathed: 1 Story Eq. Jur. 572; nor where the original debt was that of another than the testator: *Cumberland v. Codrington*, 3 Johnson Ch. (N. Y.), 257; 8 Am. Dec. 492; *Mount v. Van Ness*, 33 New Jersey Eq. 262; nor of course where the devise is expressly subjected to the mortgage.

See 3 Pomeroy Eq. Jur. sect. 1135, citing the principal case; 1 Jones on Mortgages, sect. 751.

 No. 28. — *EARL OF HUNTINGDON v. COUNTESS OF HUNTINGDON.*

(H. L. 1702.)

RULE.

WHERE a person mortgages his estate to secure the debt of another, the mortgagor is deemed to be in the position of a surety, and is entitled to exoneration of the estate by the debtor.

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Earl of Huntingdon (appellant) v. Countess of Huntingdon and others (respondents).

2 Brown's Parl. Cas. 1-4.

Mortgage. — Debt of Another. — Rights as of Surety.

A wife joins with her husband in a mortgage of her own inheritance, in [1] order to raise money to buy him a place, and the husband covenants in the mortgage to pay the money. He accordingly pays the money, and takes an assignment of the mortgage in trust for himself. The mortgage being for a term, the husband devises it for the benefit of his younger children. But on behalf of the eldest son and heir, the premises were held to be discharged from any demands by the younger children, and that the term should be assigned as he should direct.

By indenture, dated the 25th of November, 1681, and by a fine levied in pursuance thereof, Theophilus, Earl of Huntingdon, and Elizabeth his then wife, settled certain lordships, manors, lands, and hereditaments in the county of York, which were the estate and inheritance of the Countess, as one of the daughters and co-heirs at law of Sir John Lewis, to the use of the said Countess Elizabeth, and her assigns, during her natural life; and after her decease, to the use of the appellant her son, and the issue of his body, with other remainders over; but subject to a power reserved to the Earl and Countess, during their joint lives to revoke and limit new uses.

Some time afterwards, the Earl being desirous of purchasing the place of captain of the band of gentlemen pensioners, he prevailed with the Countess to join with him in mortgaging the settled estate, for raising £4500 to make such purchase; promising to repay the money out of the profits of the place, or otherwise.

Accordingly, by a deed dated the 1st of August, 1682, the Earl and Countess revoked all the former uses; and declared, that in consideration of £4500 paid to the Earl by one Cropper, the premises should remain and be to the use of the said Cropper for a term of 1000 years, subject to redemption on payment of the £4500 and interest; and after the expiration, or other sooner determination of the said term, to the use of the said Countess Elizabeth, and her assigns, during her natural life; with remainder to the appellant, and the issue of his body; and such other remainders over as were limited by the first settlement. And by

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this deed, the Earl covenanted that he would pay off the mortgage money.

[* 2] * On the 2nd of January, 1683, Cropper, together with the Earl and Countess, assigned over this mortgage to one Mr. Newport and Sir William Cooper, subject to a proviso or agreement, that if the Earl and Countess, or either of them, should pay the £4500 and interest, the term of 1000 years should be assigned to the said Earl and Countess, or to one of them, or as they or either of them should appoint.

The Earl having afterwards paid off this mortgage, procured the term to be assigned by deed, dated the 11th of February, 1687, to Sir John Foach and the respondent Sir Philip Meadows, in trust for the said Earl, his executors, administrators, or assigns; but the Countess did not join in, or was privy to this assignment.

On the 24th of December, 1688, the Countess died, and the Earl continued in possession of the estate till his death; applying part of the profits towards the maintenance of the appellant, who was the reversioner, and the residue towards satisfying the debt secured by the said mortgage.

The Earl having six younger children by his second wife, to be provided for out of his personal estate, of which he considered this mortgage money to be part, made his will on the 11th of April, 1698, and thereby devised the said mortgage, and all other his personal estate, to the respondent Dr. Gery, his executor, in trust for his said six younger children.

In 1701 the Earl died, and in Michaelmas Term in that year, the appellant exhibited his bill in the Court of Chancery against the respondents, praying an account of the rents and profits of the estate from the death of his mother; and that the defendant Sir Philip Meadows, as the surviving trustee of the 1000 years' term, might surrender, or assign the same, to attend the inheritance, free from incumbrances.

The cause being at issue, was heard before the Lord Keeper WRIGHT, on the 12th of May, 1702; when his Lordship decreed an account to be taken of what rents and profits had been received by the late Earl, out of the mortgaged premises, since the death of the Countess Elizabeth; and that the same, after a reasonable allowance to be thereout made for the plaintiff's maintenance and education, and other just allowances, should be applied towards the discharge of the said mortgage; and on payment of what

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should appear to be remaining due thereon, to the defendant, Dr. Gery, in trust for the defendants the infants; the mortgage was to be assigned to the plaintiff, or as he should appoint.

From this decree the plaintiff appealed, insisting, that he was thereby, in effect, decreed to pay the mortgage debt, which was wholly a debt of the late Earl, created to serve his particular occasions, and never was in any shape the debt of the late Countess, nor did any part of the money come to her use; besides the Earl covenanted in the mortgage deed to pay and satisfy the mortgage money and interest, and this covenant being in fact *performed, the term ought not any longer to have been [* 3] kept on foot, unless to attend and protect the inheritance, but not to charge it. That the appellant's mother being, at the time of making this mortgage, tenant for life, with remainder to the appellant in tail, and the premises being her own inheritance, the same ought not to be charged further, or otherwise than she agreed or consented; and it could not be imagined, that she agreed to charge her land any otherwise than to stand as a security for the money which her husband had occasion for, and was thereby enabled to borrow, and to be exonerated when he, the principal debtor, should pay off the debt; but she never meant to make any absolute gift of so much money to her husband, or that her estate should stand mortgaged to him, or any in trust for him, for that or any other sum. That it appeared by proof in the cause, that the Earl, in order to gain the Countess's consent to the mortgage, had promised that he would pay off the money, and discharge the land; but if the Earl had made no such promise, yet he ought not in conscience to be deemed a mortgagee or incumbrancer upon the estate, for having discharged his own debt, which he alone was liable to pay, and to be sued for by virtue of his covenant; and it was not agreeable either to reason or experience, that a principal debtor, merely by paying the debt he owes, should become a creditor, and charge his own surety with the payment of the debt, by any means or contrivance whatever.

On the other side it was contended, that the late Earl was no way compellable to discharge the land of his debt; nor did the Countess, when she agreed to mortgage the premises by raising the £4500 devise or insist on any covenant or agreement for that purpose; but, on the contrary, by the assignment of the mortgage in January, 1683, it was expressly agreed, that on payment of the

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£4500 the term should be assigned to the Earl and Countess, or as they, or either of them, should direct. That the Earl was so far from intending to exonerate the land by his paying off the mortgage money, that he not only took care to have the mortgage assigned and kept on foot, but also, considering himself as a creditor for the money so advanced, he constantly, after the death of the Countess, kept regular and exact accounts of his receipts and payments relating to the mortgaged premises. That it was certainly as lawful for the Earl to lay down the money, and take an assignment of the mortgage, as it would have been for any other person to have done, and therefore it was but reasonable that he should have the like benefit thereof to reimburse what he paid of such assignment as a stranger might have had; and since the Earl had thought fit to leave the money due on this mortgage as a provision for his six younger children, who had very slender fortunes, and a narrow subsistence, it was hoped that there would appear no ground or reason to reverse or alter this decree.

But after hearing counsel on this appeal, it was ordered and adjudged, that so much of the decree as was complained of [* 4] * should be reversed; and that the premises in question should be discharged from any demands which the respondents, the Countess of Huntingdon, or her children, or their trustees, or either of them, pretended to have, in respect of the £4500 and interest; and that the term should be assigned as the appellant should direct or appoint; and that the profits of the estate in question, which grew due, and were received by the late Earl, after the death of the late Countess, or by his executors since his death, should be accounted for to the appellant without being discounted out of the money pretended due on the mortgage; but the Master, to whom the account stood referred, was to make the respondents all such allowances for the appellant's maintenance and education, and for all monies laid out and expended in or about the management and preservation of the said estate, and all other just allowances as in the decree were directed.

Lords' Journal, vol. 17, p. 236.

Decree reversed.

ENGLISH NOTES.

The principle of the rule has been frequently applied in cases where a husband and wife have concurred in mortgaging the wife's property to secure a debt of the husband. In such cases the wife is deemed to be a

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surety for the debt, and is entitled on the husband's death to be exonerated out of the real and personal estate of the husband. See *Pocock v. Lee* (1707), 2 Vern. 603; *Tate v. Austin* (1714), 1 P. Wms. 264; *Clinton v. Hooper* (1790), 1 Ves. Jr. 173, 1 R. R. 102. If the wife or her representatives refuse to claim exoneration, a creditor of the wife may maintain an action for it. *Lancaster v. Evors* (1846), 10 Beav. 154, 16 L. J. Ch. 8, 1 Ph. 349.

The money having come into the hands of the husband is presumed to have been used by him for his own benefit, but parol evidence is admissible to rebut the presumption by showing that the money was in fact applied for the benefit of the wife. *Robinson v. Lee* (1749), 1 Ves. Sen. 251; *Clinton v. Hooper*, *supra*; *Hudson v. Carmichael* (1854), Kay. 613.

Where a wife concurs with her husband in mortgaging her separate property and also property belonging to the husband as security for his debt, she is entitled to exoneration out of his estate, not only as against him, but as against creditors in whose favour he had subsequently charged it. *Aguilar v. Aguilar* (1820), 5 Madd. 414.

Where a wife exercises a general power of appointment to create a security for her husband's debt, she is entitled to exoneration. *Thomas v. Thomas* (1855), 2 K. & J. 79, 1 Jur. (N. S.) 1160. But not so, where the mortgage is made by the exercise by husband and wife of a joint power of appointment. *Scholefield v. Lockwood* (1863), 4 De G. J. & S. 22, 33 L. J. Ch. 106, 9 Jur. (N. S.) 1258.

The wife or her representatives after her death may after the death of her husband waive her right to exoneration; and parol evidence is apparently admissible that the money was intended to be a gift to the husband, unless such intention is contrary to the express intention of the deed of disclaimer. *Clinton v. Hooper*, *supra*.

AMERICAN NOTES.

It has been repeatedly adjudged here that a wife who has mortgaged her separate estate for her husband's debt is in the position of a surety. *Cross v. Allen*, 141 United States, 528; *Demarest v. Wynkoop*, 3 Johnson Ch. (N. Y.), 129; 8 Am. Dec. 467; *Purdy v. Huntington*, 42 New York, 334; *Wilcox v. Todd*, 64 Missouri, 388; *Young v. Graff*, 28 Illinois, 20; *Bartlett v. Bartlett*, 4 Allen (Mass.), 440; *Eaton v. Nason*, 47 Maine, 132; *Green v. Scramage*, 19 Iowa, 461; 87 Am. Dec. 447; *Watson v. Thwber*, 11 Michigan, 457; *Spear v. Ward*, 20 California, 659; *Ellis v. Kenyon*, 25 Indiana, 134; *Hubbard v. Ogden*, 22 Kansas, 363; *Post v. Losey*, 111 Indiana, 74; 60 Am. Dec. 677; *Bull v. Cor*, 77 California, 54; 11 Am. St. Rep. 235; *Johns v. Reardon*, 11 Maryland, 465.

And she is entitled to exoneration out of her husband's estate. *Wilcox v. Todd*, *supra*; *Shinn v. Smith*, 79 North Carolina, 310; 1 Jones on Mortgages, sect. 114, citing the principal case.

No. 29. — Aldrich v. Cooper; Durham v. Lankester, &c., 8 Ves. 382. — Rule.

No. 29. — ALDRICH v. COOPER.

DURHAM v. LANKESTER.

DURHAM v. ARMSTRONG.

(CH. 1802.)

RULE.

A MORTGAGEE or other creditor having two funds to which he may resort, shall not disappoint another creditor who can resort only to one of those funds; in such a case the Court will marshal the funds without regard to the interests of the debtor, so as to satisfy the claim of the creditor having both funds, out of the fund which will have the other fund for the other creditors.

Aldrich v. Cooper.

Durham v. Lankester.

Durham v. Armstrong.

8 Vesey, 382-397 (7 R. R. 86).

Mortgage. — Specialty Creditor. — Simple-Contract Creditor. — Marshalling.

[382] Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple-contract creditors are entitled to stand in his place *pro tanto* against both the freehold and copyhold estates.

Mortgage of freehold estate, with a covenant, for better securing the payment, to procure admission and to surrender a copyhold estate, and in the meantime to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable.

In these causes the usual decree was made for an account of what was due to the plaintiff Aldrich, a simple-contract creditor of the intestate John Cooper, and all other the creditors: and, in case the creditors by specialty should exhaust any part of the personal estate, it was declared, that the simple-contract creditors were entitled to stand in their place, &c.

The Master's report stated, that the testator died seised of freehold estates of inheritance, subject to a mortgage made by the intestate by indentures, dated the 6th of October, 1791, for £1300:

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by which indentures also for better securing the payment he covenanted with the mortgagee to procure himself to be admitted to copyhold estates, and that he would surrender them to the mortgagee; and that until such surrender he would stand seised of the premises in trust for the mortgagee.

* The intestate died in June, 1792, not having been [* 383] admitted to the copyhold estates, leaving five sisters his co-heiresses at law, who in September, 1792, were admitted to the copyhold estates as co-heiresses of the intestate, and immediately afterwards surrendered to the mortgagee for securing what was due upon the mortgage and two bonds by the intestate to the mortgagee. The widow of the intestate took out administration, and paid out of the personal estate £767 in part of the mortgage and bonds. The personal estate being exhausted, when the cause came on for further directions, a question arose, whether the creditors by simple contract were entitled to stand in the place of the specialty creditors in respect of what they had drawn from the personal estate against the copyhold as well as the freehold estates.

Mr. Romilly, for the plaintiff, said, that, if the question as against the copyhold estate could be considered open, the principle is, that, where a creditor who has two funds chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much against the fund to which they otherwise could not have access: but he admitted, this case could not be distinguished from *Robinson v. Tounge* (Stated in Mr. Cox's note, 1 P. Wms. 680, 5th ed.).

Mr. Piggott, for the co-heiresses, relied upon the circumstance, that the only act as to the copyhold estate was the covenant for further security to be admitted and to surrender to the mortgagee, and in the meantime to stand seised in trust for him: showing the intention, that the freehold estate should be first applied, as the primary fund: the copyhold being only a subsidiary security.

The LORD CHANCELLOR (Lord ELDON):—

* The words "for better securing the payment" are not [* 384] thrown in for the purpose of making the freehold estate applicable first: but the common form of a mortgage of freehold and copyhold estates is to make the freehold liable, with a covenant to surrender the copyhold, in order to save the fine.

It is necessary to look into the case that has been cited. Free-

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hold estates are not assets for simple-contract debts; and I should have thought the same reasoning that governs that case would have applied to this.

Mr. Romilly and Mr. Stratford, for the plaintiffs.

The case before Lord HARDWICKE certainly cannot be distinguished from this; but it is impossible to support that case upon the principles upon which the Court has always acted as to marshalling assets. That case is not reported upon this point, except in Mr. Cox's note, though it is in several books upon others; nor has the point been before the Court in any other case; nor the ground taken by Lord HARDWICKE ever acted upon in any other instance. The principle as to marshalling assets as stated in *Lanoy v. The Duke of Athol*, 2 Atk. 444, see p. 446: viz., that if a creditor has two funds, he shall take his satisfaction out of that fund upon which another creditor has no lien. If it is sufficient to say, the creditor disappointed had no claim in law or equity upon the fund, that would be an answer in every case. In the instance of a simple-contract creditor, disappointed by the specialty creditors taking payment out of the personal estate, he has no claim in law or equity upon the real estate. So a legatee,

where the creditors exhaust the personal estate, has no [*385] claim but what the testator *gives him. In *Lanoy v. The*

Duke of Athol the case is put of a mortgagor of two estates and a subsequent mortgage of one of them to another person: if that estate is insufficient to pay both, the first mortgagee shall be compelled to take satisfaction out of the other estate, in order to leave to the second mortgagee that upon which alone he can go. The same argument would occur; that the second mortgagee had contracted only for a security upon the one estate, and had no claim upon the other. So a widow is entitled to her paraphernalia, though not against creditors; but if a mortgagee chooses to take them in satisfaction of his debt by bond or covenant, a Court of equity will ascertain the value, and make her a creditor for that upon the mortgaged estate. *Tipping v. Tipping*, 1 P. Wms. 729. Upon what ground, if *Robinson v. Tounge* is right, can she stand as a mortgagee upon the real estate? The distinction is clear, upon *Lutkins v. Leigh*, For. 54, and *Forrester v. Lord Leigh*, Amb. 171, that the Court will marshal for legatees against a descended estate, not against a devised estate; but they shall stand in the place of a mortgagee for what he takes out of the personal

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estate. It would be very extraordinary if the Court would marshal by placing a legatee in the situation of a mortgagee against the copyhold estate, and would not do that for creditors.

Mr. Piggott and Mr. Fonblanque, for the defendants.

These are the copyhold estates of an intestate; no intention demonstrated to subject them to debts by any testamentary disposition. They are not assets either at law or in equity; not liable to debts farther than by express contract. *Robinson v. Tonge* is not inconsistent with the cases, considering the subjects to which they apply. *Marshalling is confined [*386] to assets, and goes no farther than the jurisdiction over them. Copyhold estate is not a subject of that jurisdiction, specialty creditors having no claim upon that as they have upon freehold estate, which therefore is marshalled. The distinction is, that the specialty creditors have resort to the one fund, and not to the other. To the effect of making the copyhold estate bear its proportion of the mortgage, the heir is bound by *Robinson v. Tonge*; but the Court will not go farther than to prevent an election to the prejudice of other claims upon the freehold estate. It is safer to adhere to a case so precisely in point than to unsettle this question, after such a length of time, because in other cases there is an apparent contrariety of principle. There is no case in which that has been brought again before the Court, much less has that authority been impugned. In all the cases that have been put, the Court was applying the principle of marshalling assets. That phrase implies an equitable arrangement of two funds of the description of assets. This sort of case must have arisen repeatedly; and yet there is no instance of a determination the other way, which is evidence of the general understanding.

Mr. Romilly, in reply.

Robinson v. Tonge is certainly a very great authority; but it is to be observed, that it was decided soon after Lord HARDWICKE got the Great Seal; and as to the length of time and the acquiescence under it, for seventy years, during sixty years of that time it was utterly unknown. Mr. Cox, when he published his first edition of Peere Williams, had not found that case, and it was not published till 1793. There is no instance of its having been admitted or cited as an authority. No case corresponding with it can be found; neither can I show one overruling it. There is complete silence on both sides; but that is in favour of the plain-

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tiff, as it is not probable that a note would be taken of a [* 387] decision establishing * no new doctrine, but merely following an established rule. So it must be supposed there have been many instances of marshalling against copyhold estate. It is objected that marshalling is merely a distribution of the different assets by such an arrangement as will satisfy all the creditors, and that copyhold estate is not assets. But that which is called marshalling, is merely that rule with respect to the two funds stated by Lord HARDWICKE in *Lanoy v. The Duke of Athol*, and is called Marshalling Assets merely as being generally applied to a case of assets. But the doctrine is applied to other cases where the parties are living; as the case, mentioned in *Lanoy v. The Duke of Athol*, of the two mortgages. So, where the Crown by an extent has taken a mortgaged estate, and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour by letting him stand in the place of the Crown upon other funds not comprised in his mortgage. Another instance is the case of a surety, who is put in the place of the creditor against the other securities, though he has no charge against them. That is the common equity: *Tyut v. Tyut*, 2 P. Wms. 542, and *Deering v. Lord Winchelsea* (in the Court of Exchequer); in which each surety had given a distinct security. The same principle is applied in all these cases.

But can these copyhold estates be said in any just sense not to be assets? In other cases the Court does not proceed against assets. Real estate is not assets for payment of simple-contract debts. It must be contended, that even if the debtor makes the copyhold estate assets, the Court cannot marshal. Suppose he surrendered to the use of his will, and devised it for payment [* 388] of specialty debts; can there be a doubt, that * if the specialty creditors chose to take satisfaction out of the personal estate, the simple-contract creditors would be put in their place? Why should they not then where he has made the copyhold estate a fund for the payment of this debt by his deed?

The LORD CHANCELLOR: —

I cannot yet find this case among Lord HARDWICKE'S notes. I feel it to be my duty to understand the principle of the case before I confirm it, or to decide against it upon a principle stated from this place so clear that there can be no doubt upon it. I was surprised at the case when it was stated. Suppose there was no

freehold estate, but there was a copyhold estate, which the owner had subjected to a mortgage, and died. It is clear, the mortgagee having two funds might, if he pleased, resort to the copyhold estate. But would this Court compel him to resort to it? If so, the Court marshals by the necessary consequence of its act. If the Court would not compel him, is it not clear that it is purely matter of his will whether the simple-contract creditors shall be paid or not? That at least contradicts all the authorities, that if a party has two funds (not applying now to assets particularly) a person having an interest in one only has a right in equity to compel the former to resort to the other, if that is necessary for the satisfaction of both. I never understood, that if A. has two mortgages and B. has one, the right of B. to throw A. upon the security which B. cannot touch depends upon the circumstance whether it is a freehold or a copyhold mortgage. It does not depend upon assets only, a species of marshalling being applied in other cases; though technically we do not apply that term except to assets. So, where in bankruptcy, the Crown by extent laying hold of all the property, even against creditors the Crown has been confined to such property *as would leave the [* 389] securities of incumbrancers effectual. So, in the case of the surety, it is not by force of the contract, but that equity, upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court, placing the surety exactly in the situation of the creditor. So a surety may have the benefit of a mortgage of a copyhold estate, exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons.

So also in a case which this Court calls a just distribution of the effects of a deceased person, a simple-contract creditor has no manner of hold upon the freehold estate. How, then, is he allowed in this Court effectually to apply it for his satisfaction? Not upon the ground that it is assets, either by will or by contract *inter vivos*; but upon the ground that the specialty or mortgage creditor having two funds shall not by his will resort to that, by going to which he will disappoint as just a creditor, who cannot resort to any other. The principle in some degree is, that it shall not depend upon the will of one creditor to disappoint another. Then what is the distinction as to the copyhold estate? The

question is, whether the debtor has not subjected the copyhold estate to the extent of the mortgage imposed upon it; whether he has not decided that his property to that extent shall be liable to some debt; and the Court will extract this further principle, that a creditor who can make it liable to that extent shall not by his will defeat another, the former having two funds, the latter only one. The principle is further demonstrated by the cases of contracts by specialty that do not affect the real estate; as a bond, not mentioning heirs; there, according to Lord HARD-
[* 390] WICKE, there is no marshalling, as there *are not two funds; and therefore no one is disappointed by the option of another, the act of the creditor's will necessarily originating out of the security he has. *Robinson v. Tenge* to a certain degree relieves simple-contract creditors. The estate is charged expressly with the payment of that debt; and therefore, if the freehold and copyhold estates go to different heirs, that charge is the foundation for this Court's applying the principle of contribution; not because it is assets, but because it is charged not being assets. The effect of that as to simple-contract creditors is, that resort may be given to them upon the unexhausted part of the freehold estate, as the specialty creditors are to a certain degree thrown upon the copyhold.

The LORD CHANCELLOR:—

I have looked into every book, and can find nothing material upon this point either in print or manuscript. No book notices that there was any such point in *Robinson v. Tenge*; but it is clear from the Register's Book, by the arrangement of the decree, that the point must have occurred. The specialty creditors insisted that they had a right to have the whole copyhold estate applied to the mortgage, in order to leave the freehold estate as assets for debts. Upon that case, if that decision had not been made, I should have thought they would have had that right. I cannot conceive the principle upon which that decision stands. Mr. Cox had it from a book of Lord REDESDALE'S, a note book of Sir Thomas Sewell, who, I have no doubt, took the note himself, and preserved it as a special case. No case therefore can be entitled to more respect. The difficulty is this. Suppose the personal estate to be £1500, and simple-contract debts to that value, and a mortgage of that amount upon freehold and copyhold estates.
[* 391] The mortgagee, * if he pleases, may call for payment out

of the estate pledged. It is clear, if no third persons are concerned, the Court would arrange between the two estates if they went to different persons. In that case, if no third persons were concerned, and the estates were of equal value, that sum would be divided between them, and the simple-contract creditors would receive the whole personal estate. If the mortgagee chose to exhaust the whole personal estate, the consequence, if that doctrine is right, is, that the simple-contract creditors would stand in his place against the freehold estate at least for the proportion of the mortgage that estate ought to bear. Why? That is not the act of the testator, nor of the law. There is no more a lien for them upon the freehold estate than upon the copyhold. But the Court has said, and the principle is repeated very distinctly in *The Attorney-General v. Tyndall*, Amb. 614, that if a creditor has two funds, the interest of the debtor shall not be regarded, but the creditor having two funds shall take to that, which, paying him, will leave another fund for another creditor. If that is so as to simple-contract creditors having no connection with the freehold estate, except that principle of equity, why is not the same principle to apply to copyhold estate? Copyhold estate is not chargeable with debts; neither is freehold estate charged with simple-contract debts: but this copyhold estate is expressly charged with a debt; and if freehold estate is applied to simple-contract debts, because charged with another debt, why is not copyhold estate?

The LORD CHANCELLOR:—

This instrument, as far as it respects the copyhold estate, is certainly an inaccurate security; for the mortgagor, *covenanting to procure himself to be admitted and to [* 392] surrender, and in the meantime to stand seised to the use of the mortgagee, not being himself admitted, could not with propriety be said in the meantime to stand seised, as after admission in a sense he might. The effect of the deed is an agreement in equity pledging the copyhold estate for the payment of that sum together with the freehold estate; and I state it in these terms, as I do not understand it to be an instrument of mortgage of the freehold estate, with no more than a covenant, that, if the freehold estate should be deficient, the copyhold should be a security in aid: but I look upon it as giving the mortgagee a legal estate in the freehold, and an equitable estate in the copyhold;

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thereby giving him recourse to two funds for the payment of his debt.

The question is, whether for the sake, if it is necessary, of discharging the debts, and particularly the simple-contract debts, of the mortgagor the Court will go farther than it appears to have done, in a case which I found, I confess very much to my surprise, in Mr. Cox's note. I never had heard of it before. I do not find either in print or manuscript that it has found its way to the notice of the public, except through the channel from which Mr. Cox derived his information. There is no other note of it. Yet there is no doubt of the authenticity of that note; for Mr. Cox has in this, as in all other cases, (which makes his work of so much value in the library of a lawyer,) examined the Register's Book, which corresponds with the note. At the same time no notice is taken of that case or any other of that date in Lord HARDWICKE's notes. In fact however the records of the Court prove that there was such a case. I understand by the note that, there being no

fund but the freehold and copyhold estates, and the [* 393] * mortgage creditor having both those estates in his mortgage, it was desired that equity, in order to satisfy the specialty creditors, would require him to take his satisfaction out of the copyhold estate alone. The principle stated by the Court in answer, that copyhold estates are not liable either in law or equity to the testator's debts farther than he subjected them thereto, is undeniably true. But the question is, how it is to be applied when the testator has by contract subjected his copyhold estate to the whole of the debt; though at the same time subjecting an estate of another species also to the whole debt. I understand the opinion of the Court to have been, considering it a due application of the principle stated by Mr. Cox, that none of the rules subject any fund to a claim to which it was not before subject, but they only take care that the election of one claimant shall not prejudice the claims of others, that there were a freehold and copyhold estate, both liable to the whole mortgage by the contract and act of the testator in his life; that though the specialty creditors could not be wholly paid, unless the mortgage was thrown upon the copyhold estate, to the intent that the freehold might be open to the specialty creditors, yet the copyhold should only bear its proportion: that is, that a value should be set upon each estate; and if that distribution of the two funds left any specialty

creditors unpaid, they must abide by the loss. It is quite clear this case is by no means a due application of that principle stated by Mr. Cox. Both the copyhold and the freehold estates were before subject to the claim; and the converse of that proposition seems in some degree to follow from making the election of the mortgagee determine how far the specialty creditors shall or shall not be paid.

* I have had an opportunity of communicating with [* 394] Lord REDESDALE upon this case, and have his Lordship's authority to say, that he can reconcile it with no principle; that it was as great a surprise upon him as it was upon me; and he considers it as a case standing altogether by itself, and not reconcilable to the principles, which govern the Court in a great variety of other instances. I have also the full concurrence of Lord REDESDALE's opinion, that he would not determine according to that authority. In the consideration of this subject the word "assets" has been very frequently used. But when you come to look at the case of marshalling, though the term so frequently occurs, the operation is upon the principle that the party has a double fund. It is said, copyhold estate is not assets. Clearly, it is not assets for specialty debts; not even for the debts of the Crown. But is freehold estate assets for simple-contract debts? It is not either in law or equity. Upon what ground then does the Court say, in given cases simple-contract debts shall be paid out of the real estate? Not upon the ground of assets, but upon this: that, not every creditor having a pledge of land, but a specialty creditor, has a double fund to resort to. There may be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir. Though he has a pledge of the land, it is not as assets or as a specialty creditor. But if he has a bond or a covenant in the deed, he is a specialty creditor; whose demand after the death of the mortgagor would affect the heir. In that case then the Court says, as that specialty creditor by his specialty contract can affect the land, he has two funds: the freehold and the personal estate; and he shall not by his election disappoint the natural and moral equity of the creditor by simple contract to be paid out of the single fund which his debt affects. * The simple-contract creditor therefore [* 395] has no more in law any claim against the freehold estate than the specialty creditor in *Robinson v. Tonge* had upon the

copyhold estate. But in the former case the Court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple-contract creditor; and how can a due application of that principle be made, if it is not applied where the specialty creditor has a claim against the freehold estate but not against copyhold estate as any creditor of any sort, but both estates being pledged and made a double fund by the act and deed and contract of the mortgagor.

Suppose another case: two estates mortgaged to A., and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say a person having two funds shall not by his election disappoint the party having only one fund; and equity, to satisfy both, will throw him who has two funds upon that which can be affected by him only; to the intent that the only fund to which the other has access may remain clear to him. This has been carried to a great extent in bankruptcy; for a mortgagee whose interest in the estate was affected by an extent of the Crown has found his way, even in a question with the general creditors, to this relief: that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect *per directum*, because the Crown affected those in pledge to him. Another case may be put: that a man died having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A., and the freehold estate only was mortgaged

to B.; and that B. was not only a mortgagee of the [* 396] * freehold estate, but also a specialty creditor by a covenant

or a bond. In that case, as well as in this, it might be said the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt, that, being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity shall throw the prior incumbrancer upon the estate to which the other has no resort.

The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets

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descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling; that if those creditors, having a right to go to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets, but with relation to the fact of a double fund. Both are in law liable to the creditors, and therefore by making the option to go against the one they shall not disappoint another person, who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has by his own act in his life made liable to the whole of the debt a copyhold estate, not in law liable; and who having also a freehold estate must be understood to mean, that the freehold estate shall be liable according to law to his specialty debts.

The case is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees; for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee; and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and as by that denotation of intention the creditor has a double fund, the land devised and the personal estate, he shall not disappoint the legatee. The case is also the same, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator; as in *Lutkins v. Leigh*, For. 54: there he shall not disappoint the legatee. So the case of *Paraphernalia* is very strong for this proposition; that, wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator, *Trimmer v. Bayne*, 9 Ves. 209.

The conclusion therefore is, that the case of *Robinson v. Tonge* is not reconcilable with the general classes of cases; and therefore, if it is necessary for the payment of the creditors that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate.

ENGLISH NOTES.

Aldrich v. Cooper has always been regarded as the ruling case on the doctrine of marshalling, though it must be borne in mind that the reasoning of Lord ELDON with regard to the copyholds has in great measure become obsolete since the passing of the statute 3 & 4 Will. IV., c. 104, whereby copyholds have been rendered assets in the hands of the customary heir or devisee for payment of the debts of the ancestor or testator.

The application of this doctrine in relation to mortgages is thus stated by Lord HARDWICKE, C., in *Lanoy v. Duke of Athol* (1742), 2 Atk. 444 at p. 446: "Suppose a person who has two real estates, mortgages both of them to one person, and afterwards only one estate to a second mortgagee who had no notice of the first; the Courts, in order to relieve the second mortgagee, have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee, if that is sufficient to satisfy the first mortgage, in order to make room for the second mortgagee, even though the estates descended to two different persons."

With regard to this statement of the rule, however, it is now settled that it is not material whether the second mortgagee had or had not notice of the prior mortgage. See *Hughes v. Williams* (1850), 3 Mac. & G. 683 at p. 690. And the rule only means that a second mortgagee can compel the mortgagor and those claiming under him to pay the first mortgagee out of the property not charged in favour of the second mortgagee; the Court will not apply the rule against the first mortgagee so as to restrain him from satisfying his debt out of any property comprised in his mortgage whether subject to a subsequent incumbrance or not: *per* KAY, L. J., in *Flint v. Howard* (C. A.) 1893, 2 Ch. 54 at p. 73, 62 L. J. Ch. 804, 68 L. T. 390.

If the prior mortgagee realises part of the property comprised in his security which is charged in favour of a second mortgagee, instead of other part which is not so charged, and satisfies his debt out of the property thus realised, the second mortgagee will be entitled to stand in the place of the prior mortgagee as regards the property which has not been realised by him. *Trimmer v. Bayne* (1803), 9 Ves. 209. And the rule applies where by order of the Court in an administration action, one of two funds to which alone a subsequent incumbrancer can resort is realised, and the proceeds applied in discharge of a prior incumbrance. *Gwynne v. Edwards* (1825), 2 Russ. 289 *n.* See also *Binns v. Nichols* (1866), L. R. 2 Eq. 256, 35 L. J. Ch. 635, 14 W. R. 727.

So where there was a debt owing to the Crown and which was

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satisfied under an extent out of the real estate of the debtor it was held that other creditors might be let in to have satisfaction of their debts out of the personal assets. *Sagitary v. Hyde* (1687), 1 Vern. 455.

The bankruptcy of the mortgagor does not prevent the application of the rule, for the trustee stands in the place of the bankrupt. *Baldwin v. Belcher* (1842), 3 Dr. & War. 173.

So where a landlord distrained mortgaged chattels in the possession of the mortgagor and also other chattels belonging to the mortgagor not comprised in the mortgage, and the mortgagor subsequently became bankrupt the mortgagee was held entitled to have the chattels marshalled as against the assignees in the bankruptcy. *Ex parte Stephenson* (1847), DeGex. 586.

Marshalling may be enforced in favour of an incumbrancer whose charge is merely voluntary. *Aldridge v. Forbes* (1840), 4 Jurist 20, 9 L. J. (N. S.) Ch. 37. But it will not be allowed in favour of volunteers to the prejudice of a prior settlement. *Anstey v. Newman* (1870), 39 L. J. Ch. 769.

The rule as to marshalling is applied in favour of persons having charges or equities otherwise than by way of mortgage. So where one of two estates which were in mortgage was subsequently settled so as to be subject to a portion, it was held that a portionist was entitled to require that the unsettled property should be first resorted to for payment of the mortgage debt. *Lord Roncliffe v. Parkyns* (H. L. 1818), 6 Dow. 149, 19 R. R. 36.

A surety is entitled to the benefit of marshalling. *Heyman v. Dubois* (1871), L. R. 13 Eq. 158, 41 L. J. Ch. 224, 25 L. T. 558; and the right extends as against all persons claiming under the principal debtor. *Re Westzinthus* (1833), 5 B. & Ad. 817.

Where the owner of an estate charged with debts and legacies mortgages part of the estate, the mortgagee is entitled to the benefit of marshalling so as to throw the debts and legacies on the estate not comprised in the mortgage. *Haynes v. Forshaw* (1853), 11 Hare 93. See *Finch v. Shaw* (H. L. 1856), 5 H. L. Cas. 905.

Where a husband and wife concurred in mortgaging the lands of the wife to one, and subsequently part of the lands to another person, the second mortgagee was held entitled to require that the first mortgage should be paid off primarily out of the property not comprised in the second mortgage. *Tidd v. Lister* (1853), 3 DeG. M. & G. 857.

As a general rule the doctrine of marshalling will not be applied to the prejudice of third parties. *Flint v. Howard* (C. A.) 1893, 2 Ch. 54, 62 L. J. Ch. 804, 68 L. T. 390.

Thus the Court will not marshal in favour of a second mortgagee as against a subsequent mortgagee, so that if a first mortgage is made of

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two estates, then a mortgage of one only of the estates, and lastly a third mortgage of both estates, marshalling will not be enforced in favour of the second mortgagee as against the third mortgagee, but the first mortgage will be ordered to be paid rateably out of the two estates. So that the second mortgagee may apply the estate subject to his mortgage in or towards satisfaction thereof, leaving what remains of both estates to satisfy the third mortgage. *Barnes v. Rackster* (1842), 1 Y. & C. C. C. 401; *Trumper v. Trumper* (1873), L. R. 8 Ch. 870. 42 L. J. Ch. 641, 29 L. T. 86, 21 W. R. 692; *Re Dunlop, Dunlop v. Dunlop* (C. A. 1882), 21 Ch. D. 583, 48 L. T. 89, 31 W. R. 211.

If, however, the third mortgage is expressly made subject to and after payment of the prior mortgages, the second mortgagee will be allowed to marshal against the third. *In Re Mowers Trusts* (1869), L. R. 8 Eq. 110, 20 L. T. 838.

The doctrine will not be applied in favour of a subsequent mortgagee to the prejudice of volunteers, in favour of whom one of the estates has been conveyed by way of settlement. *Dolphin v. Aylward* (H. L. 1870), L. R. 4 H. L. 486, 23 L. T. 636, 19 W. R. 49.

Where the equities of redemption in several estates subject to the same mortgage become vested in different owners and one of such owners pays off the whole mortgage debt, he is entitled to call upon the owners of the other estates to contribute rateably according to the value of their respective estates to the payment of the debt. *Johnson v. Child* (1844), 4 Hare, 87. See also *Aldrich v. Cooper, supra*.

In order to raise the right to contribution, the several estates must have been liable to one common demand: *Re Keily*, 9 Ir. Ch. Rep. 87. Also the several estates must be liable equally and not one as surety or collateral security for the others, and must be a common fund. *Marquis of Bute v. Cunynghame* (1826), 2 Russ. 275, 26 R. R. 72; *Re Dunlop, Dunlop v. Dunlop, supra*.

AMERICAN NOTES.

This case is cited in 2 Jones on Mortgages, sect. 1628, and the principle is thus stated: "As a general rule, if a mortgagee has other security for his demand, and another creditor has a lien upon one of the funds only, the former must resort in the first place to that security upon which no other than his debtor has any claim." See to the same effect, 1 Story's Eq. Jur., sect. 559, citing the principal case; 3 Pomeroy's Eq. Jur., sects. 1111, citing the principal case. All the cases are to the same effect. It will suffice to cite *Swift v. Canby*, 12 Iowa, 414; *Ramsey's Appeal*, 2 Watts (Penn.), 228; 27 Am. Dec. 301; *Fowler v. Barksdale*, Harper Eq. (So. Car.), 164; *Terry v. Rosell*, 32 Arkansas, 178; *Warwick v. Ely*, 29 New Jersey Eq. 82; *Boone v. Clark*, 129 Illinois, 466; *Blair v. White*, 61 Vermont, 110; *Bryant v. Stephens*, 58 Alabama, 636; *Scott v. Webster*, 41 Wisconsin, 185; *Andreas v. Hubbard*, 50 Connecticut,

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551; *Sibley v. Baker*, 23 Michigan, 312; *Millsaps v. Bond*, 64 Mississippi, 453; *Russell v. Howard*, 2 McLean (U. S. Circ. Ct.), 489; *Cheeseborough v. Millard*, 1 Johnson Chancery (N. Y.), 409 (citing the principal case); *Glass v. Pullen*, 6 Bush (Kentucky), 346; *Ross v. Duggan*, 5 Colorado, 85; *Hudson v. Dismukes*, 77 Virginia, 242; *Trentman v. Eldridge*, 98 Indiana, 525; *Shackelford v. Clark*, 98 Missouri, 491; *People v. Remington*, 121 New York, 333; *Kendig v. Landis*, 135 Penn. St., 612; *Colgrove v. Tallman*, 67 New York, 98; 23 Am. Rep. 90; *Woollen's Exrs. v. Hillen's Exrs.*, 9 Gill (Maryland), 185; 52 Am. Dec. 690. *Charter v. Neal*, 24 Georgia, 346; 71 Am. Dec. 136 (citing principal case); *Trumbo v. Sorrency*, 3 T. B. Monroe (Kentucky), 284; 16 Am. Dec. 103, and notes citing principal case; *Hail v. Stevenson*, 19 Oregon, 153; 20 Am. St. Rep. 803; *Turner v. Flenniken*, 164 Penn. St. 169; 44 Am. St. Rep. 624, and cases in notes, 627.

"I admit," said Chancellor KENT, in *Cheeseborough v. Millard*, *supra*, "as a principle of equity, that if a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of those parcels only, and the prior debtor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will be entitled either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him. This is a rule founded in natural justice, and I believe it is recognized in every cultivated system of jurisprudence. In the English law it is an ordinary case that if a party has two funds, he shall not, by his election, disappoint another who has one fund only, but the latter shall stand in the place of the former, or compel the former to resort to the fund which can be affected by him only. *Sagitary v. Hyde*, 1 Vern., 455; *Mills v. Eden*, 10 Mod. 488; *Attorney-General v. Tyndall*, Amb. 614; *Aldrich v. Cooper*, 8 Vesey, 388, 391, 395; *Trimmer v. Bayne*, 9 Vesey, 20. The party liable to be affected by this election is usually protected by means of substitution. Thus, for instance, if the creditor to a bond exacts his whole demand of one of the sureties, that surety is entitled to be substituted in his place, and to a cession of his rights and securities as if he was a purchaser, either against the principal debtor or the co-sureties. This doctrine of substitution, which is familiar to the civil law (Dig. 46, 1, 17, 36; Voet. h. t. ss. 27, 29, 30), and the law of those countries in which that system essentially prevails (Poth. Oblig. n. 275, 280, 427, 519, 520, 522; 1 Kames, Eq. 122, 124; Hub. Prælec. Inst., lib. 3, tit. 21, n. 8) is equally well known in the English chancery. In the case *Ex parte Crisp*, 1 Atk. 133, Lord HARDWICKE said that where the surety paid off a debt he was entitled to have from the creditor an assignment of the security, to enable him to obtain satisfaction for what he had paid beyond his proportion; and in *Morgan v. Seymour*, 1 Ch. Rep. 64, the Court decreed that the creditor should assign over his bond to the two sureties, to enable them to help themselves against the principal debtor."

GIBSON, Ch. J., observed in *Ramsey's Appeal*, *supra*: "But if there is any rule or principle of equity plainly, positively, and incontrovertibly established on the basis of reason and authority, it is that he who may at law control the application of two or more funds, shall not be suffered to use his legal advan-

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tages in a way to exclude the demand of a fellow creditor, whose legal recourse is but to one of them. It is one of the most benign influences of equitable jurisdiction that it adjusts the application of jarring liens according to their priority and value, in such a way as to produce a degree of satisfaction to all commensurate with their rights; than which there can be no purer justice. Put it that to free his other lands from incumbrances, the mortgagor had procured the prior judgment creditors so to apply their liens as to exclude the mortgagee from the benefit of his security altogether — would not common honesty have called upon the courts to rescue their process from such abuse? The mortgagor would have felt himself insulted by the imputation of such an arrangement. And who are they that attempt to effect the same thing by setting up their legal rights as matters not to be touched by the doctrine of subrogation? They are the general creditors of the mortgagor, who have succeeded to his rights by the operation of the intestate laws, and stand in his place as the residuary owners of his title. It is certain that the doctrine is one of mere benevolence, and that it is not to be extended to the infringement of legal rights; as, for instance, by restricting a creditor to an inadequate fund, or in compelling him to take satisfaction in any way prejudicial to him."

Cognate to this doctrine is the doctrine which compels the mortgagee, where the mortgagor has aliened part of the land, to resort first to the other part; to sell in the inverse order of alienation. This principle is everywhere enforced in this country. Pomeroy cites a host of authorities to substantiate it (3 Eq. Jur. sect. 1224), and observes: "An examination of the State reports discloses the fact that no single equitable doctrine more frequently arises before the American Courts, or produces a greater number of decisions, than that which adjusts the rights of separate owners of land encumbered with the same mortgage, or adjusts the heirs of different mortgages resting upon the same parcel or parcels of land. This doctrine in the form as presented in the text is almost exclusively American; very little aid in its application can be obtained from English decisions." It is purely equitable and depends solely on the existence of equitable reasons: *Kendall v. Woodruff*, 87 New York, 7; *Marr v. Lewis*, 31 Arkansas, 203; 25 Am. Rep. 553; *Dickson v. Chorn and Dickerson*, 6 Iowa, 19; 71 Am. Dec. 382. As to the general doctrine of order of sale, see *Bates v. Ruddick*, 2 Iowa, 423; 65 Am. Dec. 774, citing principal case, and holding that two purchasers of different parcels covered by the same mortgage must contribute in proportion to value and to quantity. The Court said: "But the defendants Coffindaffer and Griffey insist that complainant, having made his purchase after theirs, should be requested to pay the whole incumbrance, or at least that the lots purchased by him should be sold before they should be called upon to pay any part of the mortgage debt. On this subject we are aware that the authorities are conflicting; and in this state the question has never, so far as we are aware, been decided. At one time in New York it was held that such purchasers were bound to contribute in proportion to the value of their respective purchases. *Cheeseborough v. Millard*, *supra*; *Stevens v. Cooper*, 1 Johns. Ch. 425 (7 Am. Dec. 499). But these cases were regarded as shaken by the subsequent one

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of *Hill v. Lyon*, Id. 446, and still later in the case of *Clowes v. Dickenson*, 5 Id. 235, to have been entirely overruled. See also *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 Id. 300; *Guion v. Knapp*, 6 Id. 35 (29 Am. Dec. 741). So that the rule in New York now is that the property purchased is liable in the inverse order of its alienation. Such is the doctrine in Maine, South Carolina, and some other states. In Massachusetts, Ohio, Kentucky, and Tennessee, and other Courts, it is held that the subsequent purchasers shall contribute in proportion to the value of their respective estates, such value not to be appreciated, however, by any improvements placed thereon by the purchasers: *Parkman v. Welch*, 19 Pickering, 231; *Green v. Ramage*, 18 Ohio, 428 (51 Am. Dec. 458); *Dickey v. Thompson*, *supra*; *Jobe v. O'Brien*, 2 Humphrey, 34; see also Story's Eq. Jur., sec. 1233, where this latter doctrine is approved by the learned author, who states also that it is that maintained by the ancient as well as modern English cases on the subject; and such we believe to be the equitable rule. Where a portion of the premises mortgaged are subsequently sold, the mortgagor retaining the remaining part, it is uniformly held that the portion unsold should in equity first be subjected to the payment of the mortgage debt. For while the mortgage covers and is a lien on all the estate alike, yet the mortgagor, in addition to his legal obligation arising as well from the mortgage as his covenants in his deed to the subsequent grantee, is morally bound to pay the debt, and divest that which he has sold of any incumbrance. And, in like manner, on his death the heir occupying his place, sitting in the seat of the ancestor or original grantor, is bound to discharge the debt to the extent of the assets descending; for there is no more equality of right between them in such a case than between the grantee and the ancestor while living.

“When we come to settle the question, however, as between two grantees, purchasing different parcels of the incumbered premises at different times, there is no more moral obligation on the one to pay than the other. Both of them have purchased premises that are alike affected by a lien, which neither created nor undertook to pay. The purchased premises are liable to be sold because of the failure of their grantor to discharge his undertaking, and not because of any failure on their part. In such cases, their interest is common, their rights are equal, and there should be equality of burden. It is difficult for us to see why the last purchaser, any more than the first, sits in the seat of the grantor; and yet this would appear to have been the reasoning used, and the ground of the decision, in *Clowes v. Dickenson*, 5 Johnson's Chancery, 240. And in those cases, where the question arises between the grantor and a subsequent purchaser, the grantor, or the land still held by him, is liable, because the debt is the personal obligation of the debtor, and not of the grantee. But where is the personal obligation resting on the last grantor more than on the first?”

No. 30. — *BANKES v. SMALL*.

(C. A. 1887.)

RULE.

A COVENANT by a mortgagor tenant in tail for further assurance, or to perfect the title by enlarging the base fee created by the mortgage, will be enforceable against him personally by way of specific performance or damages, but will not bind the issue in tail or the remainderman to carry out the covenant.

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36 Ch. D. 716-730 (S. C. 56 L. J. Ch. 832; 57 L. T. 292; 35 W. R. 765).

[716] *Estate Tail. — Enlargement of Base Fee. — Covenant for further Assurance. — Specific Performance of Agreement by Tenant in Tail. — Fines and Recoveries Act (3 & 4 Will. IV., c. 74), ss. 19, 47.*

A tenant in tail in remainder barred his estate tail without the consent of the protector, and afterwards conveyed all his estate and interest to a purchaser, and covenanted that he would, at the request of the purchaser, his heirs or assigns, execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser, his heirs and assigns. The protector having died, the purchaser applied to the vendor to execute a disentailing deed to enlarge the base fee into a fee simple. . .

Held (affirming the decision of KEKEWICH, J.), that the vendor was bound to execute such a deed, for that his covenant was not confined to executing assurances to remedy any defects in the title to the base fee, but obliged him to execute an assurance to enlarge the base fee into a fee simple, and that he had power to execute an assurance which would have that effect, for that the 19th section of the Fines and Recoveries Act is not confined to cases where the tenant in tail is owner of the base fee into which his estate tail has been converted:—

Held, also, by the Court of Appeal, that the 47th section of the Act does not interfere with the jurisdiction of the Court to decree against a tenant in tail specific performance of a contract for disentailment entered into by him, but only prevents the Court from treating the contract as being in equity a disposition taking effect under the act so as to bind the issue in tail and remainderman.

Under the will of W. Small a certain farm stood limited to Martin Small for life with remainder to his first and other sons successively in tail male. There were two sons, Martin Lambert Small and W. P. R. Small. In October, 1871, Martin L. Small barred his estate tail without the consent of the protector, and afterwards mortgaged his interest to Green. In 1874 M. Small

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and M. L. Small agreed to sell the farm to Bankes, and a conveyance was prepared, but M. Small refused to execute it. On the 30th of March, 1875, a deed was executed by which it was recited that M. L. Small and W. P. R. Small had agreed with Bankes to sell him all their estates and interests in the farm for £2200, and Green, M. L. Small, and W. P. R. Small according to their estates and interests granted the farm to Bankes in fee.

M. L. Small* and W. P. R. Small by the same deed [*717] covenanted that they had power to grant the “estates, interests, and premises thereby granted” unto and to the use of Bankes, his heirs and assigns, in manner aforesaid, and further, that they “and every person having or claiming any estate, right, title, or interest in or to the said premises or any of them through or in trust for them or either of them will at all times, at the costs of the said W. R. Bankes, his heirs or assigns, execute every such disentailing and other assurance, and do every such thing for the further or more perfectly assuring all or any of the said premises to the use of the said W. R. Bankes, his heirs or assigns, as by the said W. R. Bankes, his heirs or assigns, shall be reasonably required.”

The tenant for life died in 1884, and Bankes then requested M. L. Small to execute a disentailing deed to enlarge the base fee into a fee simple. M. L. Small refused, and Bankes thereupon brought an action for specific performance of the covenant, which was decreed by Mr. Justice KEKEWICH (34 Ch. D. 415).

The defendant appealed.

June 17. Russell Roberts, for the appellant:—

The vendors only agreed to sell such estates and interests as they could convey, and the covenant for further assurance was only a covenant to remedy any defects in the title to what was being conveyed, not a covenant to give a further estate. A covenant for further assurance is only a covenant to further and better assure what is conveyed by the deed, not to convey something which the deed does not convey. Such a covenant by a termor would not bind him to convey the fee if he acquired it. This is then only a covenant to further and better assure the base fee.

[FRY, L.J. : “How could a disentailing assurance be wanted for that purpose?]

There might be a slip in the enrolment, or a field or two might

have been left out in the parcels. The construction of the covenant, I contend, is that the vendors shall remedy all defects in the title to the interests which they convey by the deed, [* 718] and, if *necessary, by a disentailing assurance. The whole scope of the deed is confined to the estates and interests of the vendor. The old contract to which Martin Small was a party was abandoned, and there was a new contract by which the vendors agreed to sell such estate as they could. "Premises" in this covenant must be read in the same sense as in the former part of the covenant, not as denoting the property, but the estates and interests in it which were conveyed by the deed.

But supposing the Court against me on this, I contend that when a tenant in tail who creates a base fee has absolutely parted with it he cannot enlarge it into a fee simple. There is an express power in the Act to a person who has been tenant in tail and has converted it into a base fee, to enlarge his estate into a fee simple when there is no longer a protector; but this cannot apply to a person who has parted with his estate. He is not a tenant in tail within the meaning of that expression as defined by the interpretation clause. The enabling clause, sect. 15, does not apply, and the 19th section, as to enlarging a base fee, does not apply to a person who no longer has that base fee.

[The Court, at the conclusion of the appellant's argument, said that they did not wish to hear counsel for the respondent on either of the points which had been argued, but that they wished to hear them on the question, which had not been raised by the defendant either in the Court below or on the appeal, whether the 47th section of the Act did not take away the jurisdiction of the Court to decree specific performance of the covenant.]

The appeal stood over that this point might be argued.

July 5. Barber, Q.C., and Rawlinson, for the respondent:—

The Court is not asked to make an order giving any greater effect to the deed which has been executed than it had under the Act. It is only asked to make a personal order against the tenant in tail who executed the deed to enforce his performance of the covenant contained in it. The Courts of equity had power before the passing of the Fines and Recoveries Act to enforce specific performance of an agreement to suffer a recovery.

[* 719] * *Attorney-General v. Day*, 1 Ves. Sen. 218, 223; *Frank v. Mainwaring*, 2 Beav. 115, 126. The Fines and Recov-

eries Act did not take away this power. The 47th section of that Act was intended to prevent imperfect assurances from being made effectual as disentailing deeds, not to take away the jurisdiction of the Court to enforce contracts by personal process against those who make them. This jurisdiction is recognised by the 14th section of the Judicature Act, 1884, 47 & 48 Vict. c. 61, which empowers the Court to nominate a person to execute any conveyance when the person who is ordered to execute it neglects or refuses. Although there is no decided case directly in point, this view of the construction of the 47th section of the Fines and Recoveries Act has been expressed by the most eminent text-writers, and is consistent with numerous cases. Sugden's "Vendors and Purchasers," 14th ed. pp. 204, 469; Sugden's "Real Property Statutes," 2nd ed. p. 221; Hayes on "Conveyancing," 5th ed. vol. ii. p. 175; Dart's "Vendors and Purchasers," 4th ed. p. 913; 5th ed. p. 998; *Davis v. Tollemache*, 2 Jur. (N.S.) 1181; *Petre v. Duncombe*, 7 Hare, 24; *Lewis v. Duncombe*, 20 Beav. 398; *Dering v. Kynaston*, L. R. 6 Eq. 210; *Hilbers v. Parkinson*, 25 Ch. D. 200; *Hall-Dare v. Hall-Dare*, 31 Ch. D. 251; *Pryce v. Burg*, 2 Drew. 11.

Russell Roberts (Warmington, Q.C., with him), for the appellant: —

It is admitted that there is no direct authority in favour of the construction of the 47th section contended for by the respondent, and it is contrary to the general scope of the Act. The object of the Act was to prevent the Courts of equity not only from interfering for the purpose of curing defects in the assurances, but from interfering to carry out in any way the incomplete intentions of the parties. This is shown by the latter part of the 47th section, which would be ineffectual if the power of the Courts to enforce specific performance was reserved. It is true that before the Act was passed the Courts had the power of enforcing specific performance of an agreement to suffer a *recovery, and that [* 720] power was recognised by 11 Geo. IV. & 1 Will. IV., c. 36, s. 15, sub-s. 15 (repealed by 42 & 43 Vict. c. 59), which empowers the Court in certain cases to nominate a person to suffer a recovery in the place of a person refusing to do so. But the 14th section of the Judicature Act, 1884, referred to by the respondent, makes no mention of disentailing assurances. If the respondent's contention is correct the Court would have power to enforce perform-

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ance of a contract by a protector to consent, which is plainly contrary to sects. 35 and 36.

Barber, in reply.

1887, July 8. COTTON, L.J. :—

This is an appeal from a judgment of Mr. Justice KEKEWICH by which, under a covenant entered into by the appellant, he directed him by way of specific performance of that covenant to execute a disentailing deed, so as to enlarge into a fee simple the base fee which was already vested in the plaintiff.

The first point raised in the argument in favour of the appeal was that the covenant did not contain any contract by the appellant to execute such a deed. The argument was very ingenious and very subtle; but I cannot, upon looking at the terms of the covenant, entertain any doubt upon the question. The argument as I understand it was this, that a covenant for further assurance is only a covenant to further and better assure such estate as is conveyed by the deed which contains the covenant. Whether that is so or not under ordinary circumstances may be a question, but here is an express contract to execute every such disentailing deed as may be necessary in order to vest the premises in Bankes, his heirs and assigns. "Premises" there must mean property conveyed, and in my opinion the terms of the covenant are so clear as to make it impossible to doubt that this is a contract to execute, when there is a power to do so, a disentailing deed so as effectually to vest the property in the purchaser, his heirs or assigns, which means for an estate in fee simple.

Then another point was raised by the ingenuity of counsel — that no disentailing deed could now be effectually executed [*721] by *the appellant. At the time when this purchase was made there was a protector of the settlement, who refused to join in a disentailing deed, and therefore a base fee only was conveyed to the purchaser, and this covenant was entered into. The appellant now contends that as he had conveyed his base fee he was no longer to be considered a tenant in tail capable of executing a disentailing deed. In support of this his counsel relied on the interpretation clause (sect. 1) of the Act, and urged that, looking at the interpretation of "actual tenant in tail" and "tenant in tail," the appellant could not be considered a tenant in tail so as to be capable of executing a disentailing assurance, though he would have been so if he had not conveyed away the

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estate as far as he then could. Now this Act provides that the expression “ ‘ tenant in tail ’ shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred.” It was argued that this only applied where the base fee had not been parted with. But if we look at the Act, it is clear that power is left to a person who has created a base fee and parted with it, to execute another assurance which will make effectual the conveyance to the purchaser who has only got all the vendor could then grant him, viz., a base fee. The 38th section provides that if a tenant in tail creates a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards, under the Act, make a disposition of the lands in which such voidable estate shall be created, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall have the effect of confirming such voidable estate. In my opinion this contention of the appellant cannot prevail.

Those were the only two points argued on behalf of the appellant, but there was another point suggested by the Court to Mr. Barber on which we desired to hear him. That was the question whether the effect of the 47th section was not to prevent specific performance of a covenant to execute a disentailing deed. In my opinion that is not its true construction. Before proceeding to construe that section we must consider what, at the time of the passing of the Act, was the law with respect to specific performance * as regards the then mode of barring estates [*722] tail. Where a person had entered into a contract for value to bar his estate tail, a Court of equity would decree specific performance against him, and direct him to execute such assurance as would effectually bar the estate tail, *i. e.*, to levy a fine, or, if the case was one which required a common recovery, then to suffer a common recovery. But if he died without having done so, then, as against his issue in tail or the succeeding remainderman, a Court of equity would not interfere at all; that is to say, it would not give effect to a contract to suffer a recovery as if a recovery had been suffered, it would not treat what had been agreed to be done as having been done. I need not do more than refer to the case of *Attorney-General v. Day*, 1 Ves. Sen. 218. where it was held by Lord HARDWICKE that although a Court of

equity would grant specific performance as against a tenant in tail who had entered into a contract to bar the estate tail, yet it would not do so as against the issue in tail, for they take by a title paramount *per formam doni*.

There is another point also which has to be considered. The Courts of Equity, where there was either valuable or meritorious consideration, gave effect to imperfect executions of powers, and did so, not only as against the person who had actually executed the instrument which was intended to be, but was not a due execution of the power, but also as against those persons whom he could by a proper exercise of the power have defeated. That perhaps was not founded on sound principles, but it was undoubtedly done.

Bearing these points in mind we come to the consideration of sect. 47: "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof, the jurisdiction of Courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution, either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this

Act to protectors of settlements, and the supplying under [* 723] any *circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of law would not be an effectual disposition or consent under this Act." Now, looking at what I have stated to be the law, and looking at the mere construction of this clause, its object in my opinion was to prevent a Court of equity from holding that a contract to execute a disentailing assurance was, as against the issue in tail and remaindermen, as effectual in equity as if a disentailing deed had in fact been executed, and from remedying, according to the principles applicable to defective executions of powers, any defects in the execution of a deed intended to bar an estate tail. Let us look at the language of the section. The introductory words, "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements

No. 30. — *Bankes v. Small*, 36 Ch. D. 723, 724.

to dispositions of lands under this Act by tenants in tail thereof," show that the section only applies where there has been an attempt by a tenant in tail to dispose of land under the Act. It does not deal with the case of a mere contract to execute a disposition under the Act, but deals only with a deed intended to be operative under the Act, but which from some defect is not so operative. Then it says that the jurisdiction of Courts of equity is to be "excluded either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this Act to tenants in tail, or of the powers of consent given by this Act to protectors of settlements." It is true that we have here a reference to the conclusion of the jurisdiction of a Court of equity in regard to the specific performance of contracts, but it is only in cases of "dispositions of land under this Act by tenants in tail thereof," and if Mr. Justice KEKEWICH had held that the deed already executed was to be treated in equity as a good deed to bar the estate tail and remainders over under the Act, he would have gone against the 47th section. But he has not done so. He has not said that in equity this deed is to be considered as barring the estate tail; * but he has said: "Here is a con- [* 724] tract by the tenant in tail that when he has the power to do so he will effectually vest the property in the purchaser in fee, and that contract he is bound to perform." I do not give any opinion as to how far the Court could enforce specific performance of a contract by a protector of a settlement. If he contracted by deed probably that would be such a consent as is required by the Act; but I give no opinion whether the Court has power to enforce specific performance of a mere contract not under seal by a protector of a settlement, for we have only to deal here with a contract by the tenant in tail. Then the section goes on, "and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively." That points particularly to supplying or getting rid of any defects in an instrument which has been executed as a disposition of lands under this Act. Then there come words which cause a little difficulty: "and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a Court of law would not be an effectual disposition or consent

under this Act." It was urged that by specifically performing this contract we were giving effect to the attempted disposition of the tenant in tail. But that is not so. We are not remedying any defect in that disposition, nor giving effect to it when by the Act it is not effectual at law. We are requiring the tenant in tail in specific performance of his contract to execute a good deed barring the estate tail and remainders over, which he, being tenant in tail in possession, is now able to do. In my opinion on the mere construction of that section, having regard to the law that existed before the Act both with regard to contracts to suffer recoveries and with regard to giving effect to defective executions of powers, the section does not take away the jurisdiction of a Court of equity to compel a tenant in tail to do what he has agreed to do. There is no express decision on this point, but views have been expressed by the Courts, and also by counsel of great eminence, which are in accordance with the views I have expressed, and even if there were more doubt on the true construction of the section, I think it would be wrong for us, in a case which [* 725] concerns the title to real estate, to give an opinion * contrary to the views so expressed. The first I refer to is the view of Lord ST. LEONARDS in his book on the "Real Property Statutes" in 1852. He says (page 226): "It cannot be too strongly impressed upon purchasers, that their title will depend upon the legal validity of the dispositions under the statute," that is, the Fines and Recoveries Act; "nothing can be supplied," no defect can be made good so as to make the attempted deed effectual. "If the instrument, for example, be not a deed, or being a deed is not enrolled in the proper Court in due time, it will be absolutely void, and equity cannot set it up. And although equity, notwithstanding the stringent clauses in the Act, will still be able to compel a seller to make a new valid conveyance, yet that could not be enforced against the issue, nor could it be enforced against a protector. No purchaser can be deemed safe unless the deeds are properly enrolled, and he should not part with his money until that is done." Mr. Hayes (Hayes on "Conveyancing," 5th ed. vol. ii. pp. 163, 193) expresses himself to the same effect; so again does Lord ST. LEONARDS in his book on "Vendors and Purchasers" (14th ed. pp. 204, 469), and Mr. Dart (Dart's "Vendors and Purchasers," 5th ed. p. 998) expresses the same opinion, though not so fully or pointedly.

Then as regards cases, although the question has never been expressly decided, there was a case of *Lewis v. Duncombe*, 20 Beav. 398, where, in favour of a judgment creditor who under the statute had the same rights as if there had been a contract by the judgment debtor to charge the land, the MASTER OF THE ROLLS ordered the defendant to execute a proper disentailing deed. Counsel, indeed, did not appear for the judgment debtor, but Lord SELBORNE was counsel for the plaintiff, and there were several other counsel of distinction in the case, and there does not seem to have been any doubt expressed about the jurisdiction. Then in *Dering v. Kynaston*, L. R. 6 Eq. 210, 212, where the question was whether a contract to settle could be enforced as against a wife, she having acquired an estate tail in property, Mr. Southgate, the counsel for the lady or those claiming under her, and whose object it was to contend there could be no specific performance, did not in any way *suggest that the Court [*726] could not enforce specific performance of a contract to bar an estate tail or to convey by an effectual disposition under the Act property vested in the contracting party for an estate tail. His only contention was that this covenant did not apply to the property in question. What he says is this: "The Fines and Recoveries Abolition Act, sect. 47, prevents the operation in equity of any disposition by a tenant in tail not made according to the Act; and though the Court would enforce specific performance of an express agreement to execute a disentailing deed, it will not, under a general covenant to settle property, or a covenant for further assurance, not expressly referring to a disentailing deed, compel the covenantor to defeat the estate of his issue or those in remainder," and for that purpose he refers to *Davis v. Tollemache*, 2 Jur. (N.S.) 1181. The MASTER OF THE ROLLS uses the expression that if the estate tail had become vested during the coverture he should have taken time to consider the other question, but I think that in saying this he was referring to the question what was the proper construction of the covenant in that case. There is therefore a *consensus* of opinion of Judges in the view that they could enforce a contract to disentail, and even counsel of Mr. Southgate's power and eminence did not contend that the section would prevent the Court from granting a decree for specific performance against the contracting party.

In my opinion this point, though it is well it has been fully

discussed, cannot assist the appellant, and the appeal must be dismissed.

FRY, L.J. :—

At the request of Lord Justice BOWEN I proceed to deliver the next judgment.

With regard to the construction of the covenant in question I have very little to add to what has been said by Lord Justice COTTON. It appears to me that the recitals contained in the deed are strong to show that the covenant was intended to enable the purchaser to require the vendor to execute a disentailing assurance

and to convey to him the fee simple of the land. From [*727] *those recitals it appears that there had been a negotiation for the purchase of the fee simple; that that broke down in consequence of the tenant for life, the protector of the settlement refusing his consent; and that then the persons entitled in remainder in effect agreed to sell the fee simple, subject to the life estate of the tenant for life, and to make out a complete title on the death of the tenant for life. I think that the language of the covenant itself really excludes all doubt. It stipulates that a disentailing assurance shall be executed if required, and a disentailing assurance could not be required for the purpose of confirming the base fee.

The second point argued before us was this: It was said that a tenant in tail who has converted his estate tail into a base fee in favour of a purchaser cannot enlarge that base fee into a fee simple. I have no doubt of his power so to do, and, as it appears to me, the 35th section is conclusive upon the point. The 34th section having provided for the consent of the protector of the settlement, the 35th section enacts "That where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred to exercise, as to the lands in respect of which there shall be such protector, the power of disposition hereinbefore contained." That is an express recognition of the power of the person who has converted his estate tail into a base fee to enlarge that into an estate in fee simple with the assent of the protector.

Then comes the third point, which was one raised by ourselves, and which is to my mind the most difficult question we have to

consider in this case. The question turns on the true construction to be given to the 47th section of the statute for the Abolition of Fines and Recoveries.

What was the state of the law as to the jurisdiction of equity at the time of the passing of the Act? That appears to me to be the first inquiry to which I ought to address myself. In the first place, it is clear that the Court of Chancery did entertain jurisdiction in the specific performance of contracts, whether under seal or not under seal, entered into by a tenant in [*728] tail to convey the estate in fee simple — that it would compel him by the usual process of contempt to levy a fine or suffer a recovery. That the jurisdiction of specific performance was exercised is plain among other things from the case of *Attorney-General v. Day*, 1 Ves. Sen. 218, to which Mr. Barber referred, and from the enactment contained in the 11 Geo IV. & 1 Will. IV., c. 36, s. 15, sub-s. 15, to which we were referred by Mr. Russell Roberts. Of the existence of that jurisdiction in specific performance there can be no doubt. But on the other hand the Court of Chancery appears to me (and here I speak with some little doubt, because it is not very easy to discover the ancient learning on fines and recoveries) to have exercised no jurisdiction with regard to the fine or the recovery itself. That is to say, it appears to me that the Court never spelt out of the fine or the recovery a contract to do anything more than had been already done in the Court of Common Pleas, that it never raised any contract from the proceedings in that Court, that it certainly supplied no defects in execution or want of execution of any instrument required for the purposes of the feigned litigation in the Court of Common Pleas, and, as far as I can gather, it exercised no jurisdiction of a corrective or beneficial kind over the proceedings in the fine or recovery itself. That I conceive to have been the natural result of the nature of those two assurances, because they were in point of form and conception proceedings in the Court of Common Pleas, and they ended in judgments of the Court of Common Pleas in feigned actions to recover the land; and naturally one Court would not interfere with the proceedings of another Court. This is illustrated by the circumstance that the power of rectification and amendment of fines and recoveries existed in, and was very largely exercised by, the Court in which those fines were levied or those recoveries were suffered. Again, it may be observed.

as throwing some light on the inquiry, that so unwilling were the Courts of equity to assume any jurisdiction in respect of estates tail, that they require the formalities of a fine or recovery to be gone through in a Court of law in respect of equitable [* 729] estates, although those fines and those recoveries * which were so gone through in the Court of law were void in the law because they had no subject-matter on which to operate. It appears to me, therefore, to sum up these observations, that there was the jurisdiction in specific performance in cases of contract to suffer a recovery or levy a fine, but that there was no jurisdiction to aid in any manner the proceedings in the recoveries or fines themselves.

That being the state of the law, I apply myself to the construction of the clause in question, and I find throughout these clauses an anxious desire to exclude to some extent the jurisdiction of equity. I will observe first that the 40th section, which gives a power of disposition by a tenant in tail, contains this provision, that no disposition by a tenant in tail shall be of any force either in law or in equity under this Act unless made or evidenced by deed, "and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this Act." This language appears to me to indicate an intention not to exclude jurisdiction in respect of contracts generally, not to interfere with the law or the equity relating to contracts, but only to provide that no disposition by a tenant in tail resting in contract shall have any force either at law or in equity under the Act. Then when we come to the 47th section we find that the jurisdiction of Courts of equity is excluded in respect of four subject-matters of jurisdiction: first, in respect of specific performance of contracts; secondly, in respect of supplying defects in execution of powers; thirdly, in supplying want of execution of powers; and fourthly, in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector which in a Court of law would not be an effectual consent or disposition under the Act. But the whole of the section is governed by the initial words: "In cases of dispositions of lands under this Act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this Act by tenants in tail thereof."

With regard to covenants by the protector, I will follow the Lord Justice COTTON's reserve and express no opinion with regard * to them. It may be the words of sect. 36 create a [* 730] difference between that case and the case of contracts by tenants in tail. But it appears to me to be clear that if the Legislature had been minded to take away the jurisdiction of Courts of equity to enforce contracts entered into by tenants in tail, that they would thereafter bar the estate tail, very different language from that which is used in this section would have been used. The section would not have been qualified by confining it to cases of dispositions under the Act by tenants in tail: because it is manifest to my mind that contracts (I take the case of express contracts) by tenant in tail that he will sell the fee, or that he will on the happening of a certain event execute a disentailing assurance, are not dispositions of land under the Act. They are not so in terms or in intention. They are contracts at common law, and not in any way dispositions under the Act, and make no pretence to having any operation under the Act.

I have come therefore to the conclusion that the true meaning of this section is to exclude all jurisdiction to treat as effectual in equity under the Act, either on the ground of specific performance, relief against defective execution or non-execution of powers, or on any other ground, an assurance intended to operate under the Act which is not effectual under the Act; but that it leaves the jurisdiction of the Courts with regard to enforcing contracts against the persons who have entered into them totally unaffected. To put the case very shortly, I say that the covenant under which the plaintiff is suing is not a disposition of lands under the Act, and therefore that we may safely lay the ghost we have raised, and that we may also safely dismiss this appeal with the usual results.

BOWEN, L. J. : —

I have nothing to add.

ENGLISH NOTES.

Though in the above Ruling Case specific performance of a covenant to perfect a disentailing assurance was decreed in favour of a purchaser, yet the principle of the decision clearly applies equally in favour of a mortgagee, who is a purchaser *pro tanto*.

By the Fines and Recoveries Act (3 & 4 Will. IV., c. 74) dispositions by tenants in tail in remainder require the consent of the protector of the settlement in order effectually to bar the entail; otherwise a disen-

tailoring assurance executed by the tenant in tail in remainder, though in all other respects in conformity with the Act, is inoperative to confirm more than a base fee : that is to say, an estate barring the issue in tail, but not the persons entitled in remainder or expectant upon the determination of the estate tail. See section 34 of the Act. But a tenant in tail who has created a base fee, and notwithstanding that he has parted with it, may at any time afterwards enlarge the base fee into an absolute fee simple after the death of the protector or during the continuance of the protectorship with the protector's consent. See sections 35, 38, 39.

It not unfrequently happens that tenants in tail in remainder raise money on mortgage of base fees created by them without the consent or knowledge of the tenant for life in possession who is the protector of the settlement ; and the Ruling Case above set out very fully explains and determines the efficacy of the covenants usually inserted in such mortgage for perfecting the mortgagee's title by enlarging the base fee into a fee simple so soon as the same can be done.

Under the old law before the Fines and Recoveries Act, it was well settled that if the tenant in tail died before he had performed the acts necessary for completely barring the entail the issue in tail who claimed by paramount title *per formam doni* were not bound at law or in equity to perfect the title of a mortgagee of a base fee. *Stapleton v. Stapleton* (1739), 1 Atk. 2, 8.

By section 47 of the Act, the jurisdiction of the Courts of equity is excluded from giving any effect to dispositions by tenants in tail which would not be effectual in a court of law. The effect of this section is that the Court cannot compel the issue in tail or remainderman specifically to perform a covenant or contract by a tenant in tail to execute or perfect a disentailing assurance. But as against the tenant in tail himself who had entered into a covenant for further assurance generally, or to execute or perfect a disentailing assurance, an action for specific performance, or for damages, may be supported. See *Petre v. Duncombe* (1849), 7 Hare 24; *Mills v. Fox* (1887), 37 Ch. D. 162, 57 L. J. Ch. 56, 57 L. T. 792, 36 W. R. 219.

Where a covenant was for further assurance generally in the usual form, the Court refused in a suit for specific performance to compel the tenant in tail to enlarge the base fee made by the mortgage. *Davis v. Tollemache* (1856), 2 Jur. (N. S.) 1181. But in the above Ruling Case it was laid down that where there is an express covenant to execute any disentailing assurance necessary to vest the property in the grantee for an estate in fee simple, the covenanting tenant in tail, though not the issue or remainderman, may be decreed to specifically perform the covenant.

No. 51. — *Thornborough v. Baker*, 3 Swanst. 628. — Rule.

AMERICAN NOTES.

Estates tail are little recognized here, but in Illinois it has been held that an estate tail may be mortgaged by the life tenant, but not to the prejudice of the remainderman. *Hosmer v. Carter*, 68 Illinois, 98; *Lehndorf v. Cope*, 122 id. 317.

No. 31. — THORNBOROUGH *v.* BAKER.

(CH. 1675.)

RULE.

THE executor, not the heir, of a mortgagee in fee is entitled to the money secured by mortgage.

Thornborough v. Baker.

3 Swanst. 628-634 (s. c. 1 Ch. Cas. 283; 2 Freem. 143).

Money Secured by Mortgage. — Succession. — Personal Representative.

The executor, not the heir, of a mortgagee in fee, is entitled to the [628] money secured by the mortgage. Reasons of that doctrine.

Lawrence Clifton, in consideration of £500 conveyed to James Baker in fee; James, by a separate indenture, executed at the same time, agreed that if Lawrence payed £30 half-yearly during his life, and if the heirs of Lawrence after his death pay unto James Baker, his heirs, executors, administrators, or assigns, within six months after the death of Lawrence, the full sum of £500, with the interest due since the payment of the last £15, then the conveyance to be void. Lawrence died, and the plaintiff's wife is daughter and heir. James Baker died in 1659, and by his death the forfeited premises descended to John Baker, an infant, his son and heir, who was defendant, by Sir John King, his guardian, together with his mother Sarah, the administratrix of James, since married to Nichols.

The plaintiff's suit was to have the redemption: the defendants, by answer, submitted to a redemption, and the administratrix confessed that James left assets to pay his debts, besides the £500 and interest; and the question before the MASTER OF THE ROLLS was, whether the heir or administratrix should have this money? Wherein because the precedents were various, and this was like to

be a leading case for the future, the MASTER OF THE ROLLS would deliver no opinion, but left the cause to be set down before me to receive my determination upon it.

[* 629] * I decreed the money to the administratrix for these reasons : —

First, where the condition of the fee-simple mortgage mentions neither heirs nor executors, there the money ought to be paid to the executors; for so is " Littleton's " text (sect. 339), and *Goodal's case*, 5 Co. Rep. 95; and the reason is, because the money came first out of the personal estate, and so naturally returns thither again.

Secondly, when both are mentioned, but disjunctively, there, if the mortgagee pay the money precisely at the day, he may elect to pay it to the heir or executor as he pleases.

Thirdly, where the precise day is past, and the mortgage forfeited, there all election is gone in law; for in law there is no redemption.

Fourthly, though equity do still give the mortgagee a power of redemption, yet equity will not revive the power of election which was once gone, because of the inconvenience; for if it should be revived to the mortgagor, he would delay payment as he pleased, and at last force a composition, and play the money into the hand which would use him best; and if the Court should exercise that power, and take upon them to elect to whom they would give the money, it might be too arbitrary.

Fifthly, there ought so to be some certain rule; and the best rule is to come as near the rule and reason of the common law as may be: now the law always gives the money to the

[* 630] executor or administrator if no person * be named; and when the election to pay either heir or executor is forfeited, it is all one in law as if neither heir nor executor had been named.

Sixthly, to inquire whether the executor or administrator have assets or not assets, is not the measure of justice in this case: it is a proper inquiry when the Court will exercise an arbitrary disposition of the money, but otherwise it is not reasonable to hinder the mortgage money from returning to the personal estate, whence it came, only because the executor is thought to have enough already; for in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money; wherefore when this security

No. 31. — *Thornborough v. Baker*, 3 Swanst. 630, 631.

descends to the heir of the mortgagee, charged with an equity of redemption, as soon as the mortgagor pays the money the land belongs to him, and only the money to the mortgagee, which is merely personal, and so accrues to the executor or administrator.

Seventhly, although when the mortgagor covenants with the mortgagee, the case of the mortgagee's executors and administrators be so much the stronger for that personal covenant, yet without such a covenant the case is strong enough; and if the right of the money should depend upon these or the like circumstances, it might prove *casus pro amico*, which were not convenient.

Eighthly, it is not inconvenient nor absurd that the heir who loses the land should also lose the money which comes in lieu of the land; for, as hath been said, the land is no more in equity but a security; and upon this ground it is that in London mortgages in fee simple are always reckoned as part of the personal estate, and divided, according to custom.

* Then I proceeded to consider the precedents. The first [*631] was 16th June, 11 Car. I., *Saint John v. Wareham*, cited 1 Ch. Cas. 88; 2 Freem. 126. The defendants, for £3000, conveyed the lands to Sir Richard Grobham and his heirs; Sir Richard made a lease to Wareham, rendering to him and his heirs £230 *per annum*, and this lease was for seven years, with a *nomine pœne* distress and clause of re-entry, and a proviso, that if Wareham and his heirs should within seven years be desirous to repurchase, and signify the same to Sir Richard Grobham, his heirs and assigns, and pay them £3000, then he and they to assure to Wareham. Lord COVENTRY, RICHARDSON, Chief Justice, and CROOK, decreed the money to the heir of Sir Richard G., and not to the plaintiff, Saint John, who was his executor, and justly: for this was not the case of a mortgage, but of an absolute purchase; for the proviso could not turn it to a mortgage, but was a mere collateral agreement, for which there was no remedy in equity after the seven years. And so it was ruled in this Court, 16 Car. II., *Cage v. Sir Ralph Bory*; and again, T. 24 Car. II., in *Isaac Cottington v. Lord Cornbury*, where the covenant was to reconvey, upon the repayment of the purchase-money within seven years. But if the purchase-money had not been near the value of the land, that and such like circumstances might have made it a mortgage.

The next precedent was 27th October, 12 Car. II., *Tilly v.*

Egerton, 1 Rep. in Ch. 96; 3 Rep. in Ch. 35; 2 Freem. 125, where the plaintiff, having purchased from the mortgagor in fee his equity, and agreed with the mortgagee to pay £6 *per annum* for ten years, upon a suit for this redemption after the death of the mortgagee, was decreed to pay that money to the heir of the [* 632] mortgagee, and not to his administrator, because no * want of assets was proved, though alleged. This precedent, though made by the Earl of Clarendon, with advice of BRIDGMAN, Chief Justice, I could not approve, and well remember the bar was unsatisfied when the decree was made; for the original proviso mentioning neither heirs nor executors, if the money had been paid at the day, and the mortgagee had been then dead, the heir could not have had the money; then for equity, to give the heir that money after forfeiture, which he could not have had before forfeiture, was somewhat strange and arbitrary; especially when the mortgagee himself had agreed to take a certain sum, which should be ten years in paying, and so turned it to a chattel in equity.

The third precedent was 17th July, 13 Car. II., between *Martin and Hull*, executors of *Andrews*, plaintiffs, and *Gobe and Bridget his wife*, daughter and heir of *Andrews*, defendants. The Earl of Carlisle mortgaged the manor of D. to Andrews, in fee, for £1000, payable to him and his executors, and covenants to pay the money, and in default of payment to make further assurance to Andrews and his heirs, and gives bond to perform covenants; the mortgage is forfeited; then Andrews makes his will, gives his only daughter and heir but £20, his wife his household stuff, his executors the residue of all his personal estate, and dies; the heir to whom the forfeited mortgage descends exhibits a bill against the Earl of Carlisle, to redeem or be foreclosed, and obtains such a decree; the executors, who were no parties to this suit, exhibit a new bill against the Earl of Carlisle and the heir, to have this money, as being due to them by the very original defeasance of the mortgage, and secured by the covenants and bonds, which belong to them to put in suit; but this last bill was dismissed, and the first decree which gave the money to the heir or the land unredeem- [* 633] able, well approved by *CLARENDON, C., and the MASTER OF THE ROLLS. They went upon these grounds: the executors wanted no assets; the heir had no other provision, but was disinherited: the gift of the personal estate would not carry a fee simple mortgage to executors. This precedent I could not approve.

No. 31. — *Thornborough v. Baker*, 3 Swanst. 633, 634.

though I were of counsel with the heir in obtaining the decree and dismission; for the decree was obtained by the precedent of *Tilly's Case*, and when there was no executor to contest it. The dismission of the executors was obtained because the Court was already engaged in a former decree, but the reasons of it are not very strong; for assets or not assets is not the measure of justice to executors, but a pretence for favour to the heir, who either ought to have the money, though there be no assets, or not to have it, though there be assets; disherison of the heir an argument of compassion, not of right; and the gift of the personal estate by the will cannot make the case of the executors the worse, whose title was good without that bequest; for a stronger case for executors can never happen, the defeasance of the mortgage, the covenant, and the bonds, all speaking for the executors.

The fourth precedent was 21st October, 20 Car. II., between the *Lord Gorges* and *Sir Robert Dillington*, 1 Rep. in Ch. 147. Sir William Lisle mortgaged in fee to Sir Robert, proviso to be void on payment of the principal and interest to Sir Robert, his executors and administrators, and covenants to pay the money accordingly. Sir Robert dies before the principal is due; but after forfeiture for non-payment of interest, leaving Sir Robert, the defendant, his son and heir. Decreed by Lord BRIDGMAN, *Custos*, that the plaintiff, as administrator, should have the money, and the defendant the heir should convey * the security to [* 634] the administrator; and this was right and just. But after, viz., 6th March, 23. Car. II., in another case, which makes the fifth and last precedent, between — — —, Lord BRIDGMAN, *Custos*, declared, that in regard there was no defect of assets, no covenant to repay, as personal security, and the re-conveyance must be by the heir, the money ought to be paid to the heir, unless the constant course of the Court had been to the contrary. So that his Lordship adhered to his first opinion, as an assistant in *Tilly's Case*; but by this time began to doubt the course of the Court. Now this last reason, that the re-conveyance must be by the heir, doth not, *ergo*, conclude he must have the money; for he joins in a conveyance where the land is appointed to be sold by executors, yet hath none of the money; and when the mortgagor hath once paid the money according to the purport of the defeasance, the estate in law becomes a trust for him, which the heir of the mortgagee is bound to exercise. — Lord NOTTINGHAM'S MSS.

 No. 31. — *Thornborough v. Baker.* — Notes.

ENGLISH NOTES.

The above rule applies whether the mortgagor or mortgagee is in possession, for the mortgagee's entry into possession does not make the mortgage part of his real estate. *Noy v. Ellis*, 2 Ch. Cas. 220.

The mortgage moneys will be personal estate in the hands of the transferee of a mortgage. But where a man purchased land from one who turned out to be only mortgagee of the fee in possession, upon his death intestate it was held that the property purchased must be considered as real estate and go to the heir. *Cotton v. Iles* (1684), 1 Vern. 271.

So also the mortgagee may, as between his real and personal representatives, convert his beneficial interest in the mortgage as well as any other part of his personal estate, and make it pass accordingly. *Noys v. Mordaunt* (1706), 2 Vern. 581.

If two or more persons advance money jointly on mortgage, and one of them die, the mortgage debt will at law belong to the survivor, but in equity there will be a tenancy in common, the rights of several mortgagees who have contributed to the advance of a sum of money being deemed to be severally proportional to the respective amounts advanced by each. *Petty v. Stypward*, 1 Rep. in Ch. 31. See *Steads v. Steads* (1889), 22 Q. B. D. 537, 541, 58 L. J. Q. B. 302, 60 L. T. 318, 37 W. R. 378. And upon a subsequent transfer or reconveyance of such a mortgage, the concurrence of the personal representatives of the deceased mortgagee is necessary to give a valid discharge for the mortgage moneys. *Hinde v. Poole* (1855), 1 K. & J. 383.

Where, therefore, money is lent upon mortgage by trustees, and it is not desirable to put notice of the trust on the mortgage deed, it is the practice to insert a declaration that if one of the mortgagees shall die before the money is paid off, the receipt of the survivor shall be a sufficient discharge, and that the concurrence of the personal representative of the deceased mortgagee shall not be requisite. By section 61 of the Conveyancing and Law of Property Act (44 & 45 Vict., c. 41), a similar effect is given to a declaration that the advance is made on a joint account.

As between husband and wife (except for the provisions of the Married Women's Property Act 1882), where property is mortgaged to the wife to secure an advance made by the wife, the husband might at any time during the coverture reduce the mortgage debt into possession and make it his own; and payment of the mortgage to the husband is a reduction into possession. See *Jordan v. Jones* (1847), 2 Ph. 170. If the mortgage be for a term of years the husband alone might assign or surrender the term together with the debt so as to bind the wife

No. 31. — *Thornborough v. Baker.* — Notes.

surviving. *Packer v. Wyndham*, Pre. Ch. 412; *Bates v. Dandy* (1741), 2 Atk. 207, 3 Russ. 72. But if the mortgage be in fee it would seem that the concurrence of the wife would be necessary to transfer or reconvey the mortgage; and if the husband has otherwise reduced the mortgage debt into possession, she would become a trustee of the legal estate. See *Burnett v. Kinnaston* (1760), 2 Vern. 401; *Mitford v. Mitford* (1803), 9 Ves. 89; *Stiffe v. Everett* (1836), 1 My. & Cr. 39, 5 L. J. (N. S.) Ch. 138.

Money belonging to a married woman and invested on mortgage security, like any other property belonging to her, if she was married or if her title to the money accrued after the commencement of the Married Women's Property Act, 1882, *i. e.*, the first of January, 1883, is not subject to her husband's control or interference; and she can accordingly exercise all the rights and remedies of a mortgagee under her security, and give an effectual receipt for the mortgage money as if she were a *feme sole*. See 45 & 46 Vict., c. 75, ss. 2, 5.

Whether a mortgage to a married woman was made previously to the Act or not, the husband surviving and taking out administration to his wife's effects, entitles himself absolutely to the beneficial interest in the mortgage which she has not disposed of by will. *Re Lambert's Estate*, *Stanton v. Lambert* (1888), 39 Ch. D. 626, 57 L. J. Ch. 927, 59 L. T. 429. But if the wife survives and the mortgage debt has not been reduced into possession by the husband, she will be absolutely entitled thereto.

AMERICAN NOTES.

This principle is quite elementary. Mortgages are personal property and go to the personal representative. 2 Jones on Mortgages, sect. 1248; *Gibson v. Bailey*, 9 New Hampshire, 168; *Haskins v. Hawkes*, 108 Mass. 379. "Now we think it very clear that according to the general principles relating to mortgages, as well as according to the provisions of our statutes, heirs, as such, have not such an interest in the mortgage as will entitle them to enter, or to have an action for condition broken. For as the debt belongs to the executor or administrator, to be administered according to law, so does the mortgage, which is only a security for the debt."

Principal case cited, 2 Washburn on Real Property, p. 535, note.

Surplus moneys arising on sale belong to the heir or devisee. *Dunning v. Ocean Bank*, 61 New York, 497; 19 Am. Rep. 293; *Chaffee v. Franklin*, 11 Rhode Island, 578; *Shaw v. Hoadley*, 8 Blackford (Indiana), 165.

No. 32. — *IN RE STEVENS' WILL*.

(1868.)

RULE.

INDEPENDENTLY of Statute, a general devise of lands, unless a contrary intention appears from the will, passes the legal estate in lands vested in the testator as mortgagee.

In re Stevens' Will.

L. R. 6 Eq. 597-599 (s. c. 41 L. J. Ch. 537).

[597] *Will. — Devise by Mortgagee. — Gift of Legacies followed by general Devise of Realty. — Legal Estate in Mortgage held to pass.*

A testatrix directed her just debts to be paid. She then gave pecuniary legacies, and gave all the rest, residue, and remainder of her real and personal estate and effects to J. T., for her own absolute use and benefit.

Held, that although by these dispositions the testatrix's own real estate was charged with debts and legacies, an estate of which she was mortgagee was not excepted from the residuary devise.

This was a petition under the Trustee Act, 1850, for the appointment of a person to convey in the place of the heir of a mortgagee, who could not be found.

M. A. E. Stevens, being mortgagee in fee of a copyhold, made a will, dated the 31st of May, 1850, which contained this clause: "I direct all my just debts to be paid as soon as conveniently can be after my death." The testatrix then specifically disposed of a sum of £2000 bank annuities, and gave several general pecuniary legacies, and continued: "And as to all the rest, residue, and remainder of my real and personal estate and effects, I give and devise the same unto my friend, Jane Tozer, for her own absolute use and benefit."

The testatrix died in 1851, and her customary heir could not be found. Her executors and the persons entitled to the equity of redemption having agreed to sell the mortgaged estate, the purchaser took the objection that the legal estate did not pass by the will. This petition was therefore presented; it being arranged that if the Court considered the estate to have passed by the devise, the purchaser should pay the costs of the petition.

No. 32. — *In re Stevens' Will*, L. R. 6 Eq. 597, 598.

Mr. C. Hall, for the petitioners : —

An order is unnecessary. The words "own absolute use and benefit" will not exclude a mortgaged estate from a general devise. *Lewis v. Mathers*, L. R. 2 Eq. 177. Nor will the direction to pay debts, for it means only pay debts out of such property as I can subject to them. Nor will the charge of legacies have that effect, *for the same reason applies. The [* 598] tendency of the Courts lately has been against excluding mortgaged estates from general devises. *Rippen v. Priest*, 13 C. B. (N. S.) 308, where it was held, in opposition to some older cases, that a gift of "securities for money," subject to payment of debts, would pass the legal estate in a mortgaged property.

Mr. Cadman Jones, for the purchaser : —

Where a testator gives pecuniary legacies, and then disposes of "the rest, residue, and remainder" of his real and personal estates, the land is charged with the legacies, on the ground that "rest, residue, and remainder" means what remains after payment of legacies. *Cole v. Turner*, 4 Russ. 376; *Greville v. Browne*, 7 H. L. C. 689. Now, a gift of "the rest, residue, and remainder, after payment of legacies," would not pass a mortgaged estate: *Roe v. Reade*, 8 T. R. 118; *Doe v. Lightfoot*, 8 M. & W. 553; and it is immaterial whether the deductions which make it a "residue" are expressed or understood. "Securities for money" seems, *ex vi termini*, to include a mortgage, and cases turning on those words are inapplicable.

Sir G. M. GIFFARD, V.C. : —

This is not the case of a mere trust estate, but of the legal estate in a mortgage, the beneficial interest in which mortgage was vested in the testatrix.

The charge of legacies was the point insisted on as being a reason why the legal estate in this mortgaged property should not pass.

I quite agree that in this will there is enough to charge both the debts and legacies on the testatrix's own real estate, but if the charge of debts would not prevent the legal estate in the mortgaged property passing, so neither would the charge of legacies. The modern authorities have extended the cases in which the legal estate in a mortgage has been held to pass.

Here, subject to the charge of debts and legacies, there was an absolute gift to Jane Tozer. I am not precluded by authority

from holding that the legal estate passes in this case; [* 599] and I do not * hesitate to say that, in a case such as this, good sense and convenience require that a beneficial gift should carry the legal estate in a mortgage as an incident, and a useful and necessary incident, to the beneficial ownership. There may be cases where a trust estate would not pass, and yet there would be a plain intention that the legal estate in a mortgage should pass.

I am of opinion that on this will there was an intention that the legal estate in the mortgage should pass, and there is nothing to rebut this intention.

There will be no other order than that, it appearing to the Court that the legal estate in the mortgaged property passed by the will, let the respondent pay the costs of this petition.

ENGLISH NOTES.

Formerly, the legal estate in the mortgaged property devolved according to the ordinary common-law rules in relation to the devolution of property held absolutely and not by way of mortgage. Accordingly, upon the death of a mortgagee intestate, if the mortgage was of freehold the legal estate devolved upon his heir-at-law, if of copyhold upon his customary heir, and if of leaseholds or other personalty, upon his personal representative. Inasmuch, therefore, as the mortgage debt became upon the death of the mortgagee personal assets in the hands of his administrator, it frequently happened, where the mortgage was of realty, that the legal estate in the mortgaged property and the right to the mortgage debt fell into different hands. In such a case the heir-at-law or customary heir held the estate as trustee for the personal representative, and was bound to convey it accordingly. See *Ex parte Morgan* (1804), 10 Ves. 101.

The mortgagor might, however, by his will by apt words devise the legal estate in the mortgaged property to one person, and bequeath the beneficial estate to another person, in which case the devisee became a trustee, first, for the executors, and after their assent for the legatee. Frequently, however, in order to avoid the inconvenience arising from the legal and beneficial estates being vested in different persons, testators expressly devised all legal estates vested in them by way of mortgage to their executors, so as to enable them effectually to deal with the property and enforce their remedies, without recourse to any other person.

The general rule above stated, that mortgaged estates will pass by a general devise, is a rule of construction and not of law, and depends

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upon the intention of the testator as gathered from the whole will, looking at the nature of the limitations and of the powers given to the devisee. *Re Packman and Moss* (1875), 1 Ch. D. 214, 45 L. J. Ch. 54, 34 L. T. 110, 24 W. R. 170. See *Lord Braybrooke v. Inskip* (1803), 8 Ves. 417, 435, 7 R. R. 106; *Lindsell v. Thacker* (1841), 12 Sim. 178, 182.

But the intention that the mortgaged estates shall not pass must appear by expressions indicating an intention that they shall not pass; and even a general devise to a person "for his own absolute use and benefit" will not prevent the legal estate in mortgaged property from passing. *Ex parte Shaw* (1836), 8 Sim. 159; *Bainbridge v. Lord Ashburton* (1836), 2 Y. & C. Ex. 347.

The legal estate in mortgaged lands will not, however, pass if the property comprised in the general devise is made subject to a charge of debts or legacies. *Duke of Leeds v. Munday* (1797), 3 Ves. 348; *Re Packman and Moss*, *supra*. Where, however, as in the above Ruling Case, not only the legal estate but also the beneficial interest in the mortgage moneys is vested in the testator, a charge of debts will not prevent the legal estate from passing.

The legal estate will not pass to a general devisee if the will contains any limitations or provisions which show that the testator cannot have intended the devise to apply to property which was not beneficially his own; as, for instance, if he has devised his general real estate to uses in strict settlement. *Thompson v. Grant* (1819), 4 Madd. 438, 20 R. R. 318. So also generally where the realty is devised on a trust for sale. *Ex parte Marshall* (1839), 9 Sim. 555.

But where realty and personalty are given together upon trust to sell and get in all debts, since the devisees cannot execute these trusts as regards the personalty without having the mortgaged estate, it is presumed that the legal estate in the mortgaged realty must have been intended to pass. *Re Arrowsmith's Trusts* (1858), 27 L. J. Ch. 704.

So also a devise to a class coupled with words of severance will be deemed to be a sufficient indication of intention that mortgaged estates shall not pass. *Martin v. Laverton* (1870), L. R. 9 Eq. 563, 39 L. J. Ch. 166, 22 L. T. 700, 18 W. R. 561.

An alteration in the law was made by the Vendor and Purchaser Act, 1874 (37 & 38 Vict., c. 78), which enacted as follows:—

Sect. 4. "The legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate to which the mortgagee shall have been admitted, may on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust."

This section applied only to cases where the mortgage was paid off and discharged, and did not enable the personal representatives of the mortgagee to convey the legal estate by way of transfer, though the transferee should pay to them the amount owing on the mortgage. *Re Spreadberg's Mortgage* (1880), 14 Ch. D. 514, 49 L. J. Ch. 623, 43 L. T. 82, 28 W. R. 822. Nor did the section apply so as to enable the personal representatives to sell and convey in exercise of a power of sale in the mortgage deed. *Re White's Mortgage* (1881), 29 W. R. 820.

By section 5 of the same Act it was enacted that upon the death of a bare trustee of any hereditaments in fee simple the same should vest in his personal representatives. This section was repealed as from the 1st January, 1876, but re-enacted, in a form limited to cases of intestacy, by section 48 of the Land Transfer Act, 1875 (38 & 39 Vict., c. 87). This latter section was in its turn repealed by section 30 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), which enacts as follows:—

“(1) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives for the time being of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

“(2) Section 4 of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

“(3) This section, including the repeals therein, applies only in cases of death after the commencement of this Act.”

The effect of this enactment as regards a mortgagee dying since the 31st December, 1881, whether testate or intestate, is to vest the legal estate in mortgaged realty in his personal representative, and so to render unnecessary and inoperative any devise of mortgaged estates. Any such devise, if made, will be inoperative, inasmuch as, by virtue of the enactment, “notwithstanding any testamentary disposition to

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the contrary," the legal estate will devolve on the personal representatives of the mortgagee as "his heirs and assigns" for the purposes of the enactment.

The repeals effected by section 30 of the Conveyancing and Law of Property Act, 1881, apply only in cases of death after the commencement of that Act, and consequently section 4 of the Vendor and Purchaser Act, 1874, still remains in force as regards deaths before the 1st January, 1882. Thus in the case of a sole mortgagee who died between the 7th August, 1874, and the 31st December, 1881, both dates inclusive, the personal representatives have still power, on payment off of the mortgage moneys, to convey the legal estate in the mortgaged lands; but until they exercise the power, and unless the mortgage is paid off, the legal estate remains vested in the heir or devisee.

It was held that the term "tenements and hereditaments" in section 30 of the Conveyancing and Law of Property Act, 1881, included copyholds; but this construction was negatived by section 45 of the Copyhold Act, 1857 (50 & 51 Vict., c. 73), repealed but in effect re-enacted by the Copyhold Act, 1894 (57 & 58 Vict., c. 46), s. 88, which enacts that "section 30 of the Conveyancing and Law of Property Act, 1881, shall not apply to lands of Copyhold or customary tenure vested in the tenant of the Court Rolls on trust or by way of mortgage." The result is that section 30 of the Act of 1881 must be read as if it had originally never applied to lands of copyhold or customary tenure to which the mortgagee had been admitted. *Re Mill's Trust* (1887), 37 Ch. D. 312, 57 L. J. Ch. 466, 58 L. T. 620, 36 W. R. 393, affirmed on another point (C. A. 1888), 40 Ch. D. 14, 60 L. T. 442, 37 W. R. 81.

AMERICAN NOTES.

This subject is examined in 3 Redfield on Wills, sect. 98, citing only English cases.

No. 33. — MATTHEWS *v.* WALLWYN.

(CH. 1798.)

RULE.

A MORTGAGEE may assign the mortgage debt and the securities for the same by way of absolute transfer or by way of sub-mortgage; but under an assignment of a mortgage without the mortgagor's concurrence, the assignee can only claim what is owing on the security, on the footing of

such accounts and equities as would bind the original mortgagee.

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4 Vesey, 118–129.

Mortgage. — Assignment. — Assignee takes Debt as it stood between Mortgagor and original Mortgagee.

[118] Assignment of a mortgage without the privity of the mortgagor: the assignee takes subject to the account between the mortgagor and mortgagee.

A settled account between attorney and client opened upon general allegations by the client of error, admitted: though no specific errors were pointed out.

As between mortgagee and persons claiming under him, without the privity of the mortgagor, they cannot add to what is due, settle the account, or turn interest into principal.

Thomas Matthews, being tenant for life of real estates, applied to Wallwyn Shepherd, who was his solicitor, to procure him the sum of £2000. Shepherd accordingly procured John Baker to advance that sum upon the mortgage of the estates, of which

Matthews was tenant for life, and an assignment of a [*119] policy of *insurance for £2000 made by Matthews for his life in January, 1788. That mortgage and assignment, dated the 20th of May, 1788, were executed accordingly to Baker, his executors, administrators, and assigns for ninety-nine years, if Matthews should so long live, subject to redemption; with a covenant, that Matthews would keep the said sum of £2000 insured for his life.

Baker having been afterwards paid by Shepherd, Matthews gave Shepherd a bond for £2000, dated the 25th of March, 1791: and by indentures of the same date the mortgage and the policy of insurance were assigned to Shepherd. In January, 1792, Shepherd borrowed from Hercy and Co., bankers, the sum of £2000; and on that occasion he deposited with them the indentures of the 20th of May, 1788, and the 25th of March, 1791, and the bond and the policy of insurance, and a note, under his hand, declaring that the said instruments were deposited as a security for that sum with interest. In March, 1794, Hercy and Co. calling for repayment, Shepherd applied to Wallwyn and Co., bankers, to open an account with him; requesting them

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to lend him £2000, and proposing to deposit the deeds and securities then in the hands of Hercy and Co. as a security; and representing that it would be necessary to have part of such moneys for the purpose of redeeming them, before he could deliver them to Wallwyn and Co. They consented to open an account with him, and to advance or give him credit for the sum of £2000 upon the proposed security and the farther security of his note. On the 21st of March, 1794, they advanced him the sum of £1000 for the purpose of redeeming the securities; and upon the 24th of March he deposited all the said securities with them, and gave them his promissory note at three months for £2000 and interest; and he wrote a note declaring the purpose of the deposit. Afterwards, before the 24th of June, 1794, he drew upon them to the amount of £1431 9s. 4*d.* exclusive of the £1000 originally advanced. They received upon his account only £600; and upon the 24th of June, 1794, when his note became due, the balance due to Wallwyn and Co. was £1856 13s. 5*d.* In January, 1795, Shephard became a bankrupt. By indentures, dated the 29th of September, 1797, executed in pursuance of a decree made at the Rolls upon the 14th of June, 1797, upon a bill filed by Wallwyn and Co. in December, 1794, the assignees of Shephard assigned all the said securities to the plaintiffs in that cause. Matthews was made a defendant in that suit; but *before [* 120] the hearing the plaintiffs had the bill as against him dismissed with costs.

Shephard as the attorney and solicitor of Matthews was in the habit of receiving and paying large sums of money upon his account; and the premiums upon the policy of insurance were paid by him, and charged in account with Matthews. Upon the bankruptcy of Shephard, Wallwyn and Co. paid one premium upon that policy, which became due in January, 1795. By an account settled and signed by Matthews and Shephard upon the 11th of October, 1794, a balance of £4400 appeared due to Shephard. Matthews had no notice of Shephard's transactions with Hercy and Co. and Wallwyn and Co. as to the securities assigned to him by Matthews, till the bill was filed against him in December, 1794.

This bill was filed by Matthews against Wallwyn and Co. and against the assignees of Shephard, who was dead; praying that the assignees of Shephard may be decreed to come to a fair settle-

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ment of accounts depending between the plaintiff and Shephard; and that the plaintiff may be at liberty to redeem the mortgaged premises, if anything shall appear to be due from him upon the settlement of accounts in respect of the said mortgage; and that the defendants Wallwyn and Co. may re-convey and re-assign to the plaintiff the mortgaged premises, and deliver up the said securities to be cancelled; and that they may be restrained by injunction from proceeding at law; the plaintiff offering to pay what, if anything, shall appear to be due from him upon the aforesaid settlement of accounts on account of the said mortgage.

The bill charged that the plaintiff, having been informed by some of Shephard's friends that he was in an embarrassed situation, but that if the plaintiff would give him a security for the balance then due to him, it would be of infinite service to him in enabling him to settle with his creditors, and the plaintiff being willing to assist Shephard, and imagining himself to be more in debt to him than he really was, promised to do so when the account should be properly made out and settled. In a few hours Shephard produced an account, and requested the plaintiff to sign it; and the plaintiff did sign it at his earnest solicitation, and upon his agreeing to permit the plaintiff to take it into the

country for the purpose of examining it and making such [*121] alterations *as should be proper. The plaintiff has since

discovered that Shephard previous thereto had received for the plaintiff's use divers sums of money, for which he had not given the plaintiff credit in the account; and that if such sums together with several sums received by him since signing the account were deducted, a considerable balance would be due to the plaintiff; especially as he has also discovered that several sums, with which he was charged in the account as having been paid by Shephard, were not paid by him.

The defendants Wallwyn and Co. by their answer submitted, that Shephard being the plaintiff's attorney was sufficient notice to him; and that they are entitled to a specific lien upon the mortgaged premises and securities in respect of the sum of £1856 13s. 5*d.*, the balance due to them from Shephard upon the 24th of June, 1794; whether the said sum of £2000 was or was not due from the plaintiff to Shephard when the defendants advanced the said £2000 upon the said securities, or whether the same was or was not afterwards satisfied or paid to Shephard by the plaintiff,

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or by reason of moneys received by Shephard upon his account; and that they ought not to be restrained from proceeding by ejectment to recover possession.

The assignees of Shephard by their answer submitted to account.

The cause was heard upon bill and answer. When it was first opened, the LORD CHANCELLOR directed it to stand over, that it might be formally argued; considering the point to be new, and of great importance, as it might affect the general credit of mortgages.

Solicitor-General and Mr. Richards, for the plaintiff.

It is a settled principle that the assignee of a mortgage can be in no better situation than the mortgagee. Upon inquiry as to the practice in the Master's office it appears that in the account between the mortgagor and mortgagee the Master takes into consideration what is the real debt; and if the mortgagee has received money collaterally, the mortgagor shall have credit for it. According to a manuscript note of *Lunn v. St. John*, Lord THURLOW expressed a strong opinion upon this point against the mortgagor, though it does not amount to a decision. An account was directed of what was due at the time of the mortgage, what was due at *the time of the assignment, and what remained [*122] due. Consider the case of a West India mortgage. Payments on that account are usually made by bills upon this country at long dates and by instalments. It is not the practice upon the receipt of each bill to indorse that upon the mortgage deed. There is a dealing between the mortgagor and mortgagee, in consequence of which the debt is much reduced; it is always considered that the account is to be taken upon the foot of the transactions between the parties. There is no case to be found *in terminis* like this; but it is impossible upon principle not to see that the assignee is affected by all the equity that affects the mortgagee. It must be known that the mortgage is only a security for a debt. It has never been doubted that the assignee has no right to call upon the mortgagor for interest, which he has paid to the mortgagee. The mortgagor may in the account with the assignee take advantage of payments of interest to the mortgagee, though the assignee has no notice. In 1 Eq. Ca. Ab. 328, tit. "Mortgage," it is laid down that if a mortgagee in possession assigns without the assent of the mortgagor to an insolvent person, the mortgagee is bound to answer the profits both before and after the assignment. The *quære* there

proves the principle of the case. In the same book it is held that if a mortgagee assigns, he must be a party to a bill of redemption, that he may account for the profits he has received. That shows he has not discharged himself from all connection with the mortgagor by assigning the mortgage. There is another case to show that an account between the mortgagee and the assignee will not conclude the mortgagor; but there must be an inquiry, what was due at the time of the assignment. The assignee therefore is to be bound by the receipts and payments, and by the equity of the mortgagor.

In this case a similar course to that adopted in *Lunn v. St. John* ought to be taken. An account must be directed of what was due to Shephard at the time of the assignment to him, and what was due at the time the plaintiff had first notice of the assignments Shephard made, which was by the bill filed in 1794. The plaintiff was dealing with Shephard under the idea that he was the person who had a right to call for what was due upon the mortgage. He was the confidential attorney of the plaintiff. The assignment to the defendants was merely [*123] equitable, by a deposit of the securities. * Will the mere circumstance of their having now got the legal estate give them a right to have the mortgage-money paid over again? It was by their fault, in neglecting to give the plaintiff notice, that Shephard received payments on his account. A singular case may arise if the plaintiff is not right. If the defendants had applied upon the bond, which was also deposited with them by Shephard, they must have been affected by all the equity that bound him; then it would be extraordinary, where both securities are for the same thing, and the mortgage is considered only as a collateral security, that the principal instrument, the bond, shall not avail the defendants at all, or at least not for more than what is justly due, but if he chooses to resort to the other security, he shall be entitled to recover the whole. The inconvenience would be very great. Suppose the mortgagee lives at a distance; it cannot be imputed to the mortgagor as laches, that he does not see the indorsement made upon the deed. There would be no way of securing himself from paying over again but by paying the whole at once. No man is obliged to give a receipt; and in tithe cases particularly receipts are not given, from an apprehension of creating evidence. This case is not like that of a purchaser for valuable

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consideration without notice, taking the legal estate; for the nature of the thing shows it is a security for money.

Mr. Mansfield and Mr. Buske, for the defendants Wallywn and Co.

There is no doubt, if a bond or covenant is assigned, it is assigned subject to all the equity between the original obligor or covenantor and the obligee or covenantee. There is a great difference between an instrument in its nature assignable, and conveying the estate at law, and an instrument not in its nature assignable. A mortgage conveys a legal right. The assignee has nothing to do with the equities between the mortgagor and mortgagee. The deed being left in the hands of the assignee without indorsement is evidence to all the world that the mortgage-money is still due. Many cases are to be found that leaving deeds in the possession of a person, showing a title in that person to the estate, is considered as a case of fraud. In *Tourle v. Rand*, 2 Bro. C. C. 650, Lord THURLOW certainly shook that doctrine, which, however, was laid down as clear in equity by Lord Chief Justice WILLES; but it has never been imputed as laches, that a person taking fairly the legal estate for valuable consideration has *not [*124] gone to inquire into the account as to the principal money between the mortgagor and mortgagee; as to the account of interest, no one will ever advance more than the principal without communication with the mortgagor. The assignee will take care that no interest shall be paid to the mortgagee after the assignment. Why did the mortgagor suffer his deeds to remain with the defendants? It was his laches. He might have found out from Shephard where his deeds were. Having paid all the money due, he ought to have had them delivered to him. A mortgagor may always be secure by indorsing upon the deed, if he pays part, and by taking up the deed if he pays the whole. As to the cases cited from “*Equity Cases Abridged*,” certainly the Court will not permit the mortgagee to injure the mortgagor by taking the legal possession, and transferring it to an insolvent person. It is truly said that then the mortgagee is a trustee of the profits; the other case, that the mortgagor shall not be concluded by an account between the mortgagee and assignee, I conclude, related to some computation of interest; and it rather supposes the mortgagee to be in possession. It would have been very simple and easy to have said as to the question, how the

account was to be taken, that the assignee should be accountable just as the mortgagee was. Where it is a simple transaction between a mortgagee and a person to whom he owes money, it is never necessary for the mortgagor to join. The defendants had no notice that Shepheard was the plaintiff's attorney.

Attorney-General, for the defendants the assignees of Shepheard, cited *Dawson v. Dawson*, 1 Atk. 1; *Taylor v. Haglin*, 2 Bro. C. C. 310, and *Johnson v. Curtis*, 3 Bro. C. C. 266, as authorities, that a settled account, even with the expression "errors excepted," cannot be opened, unless specific errors are pointed out.

Solicitor-General, in reply.

If this point had not been always considered clear in favour of the mortgagor, it must have come on upon the question of notice. The decree at the Rolls, the plaintiff being no party to the suit, cannot affect him. The case of a mortgagee in possession [* 125] which has been frequently decided, and * is the case most likely to happen, decides this question. The only difference is that where the mortgagee has been in possession there must be an account of the rents and profits; but if he has not been in possession, then it is equally clear there is an account of debtor and creditor to be taken. The assignee has always notice that he takes an assignment of a matter of account; and therefore it is due from him to see to the account. It is not the practice to take an assignment without the mortgagor's being a party, unless he cannot be got at; and then it is incumbent upon the assignee to take all means of inquiry; and there is always a covenant upon the part of the mortgagee, that the sum stated in the assignment is due upon the mortgage. The mortgagor has no right to insist upon an indorsement on the deed; on the contrary the mortgagee may take even the whole money, and refuse to execute an assignment till his counsel approve it. An action may be brought upon the bond, even after the mortgage is assigned. Can the assignee of the mortgage have the benefit of that, which is part of the security, though the assignee of the bond, part of the same security, could not? Particular notice is not necessary: because a mortgage is always considered as a case of notice that there is an account, debtor and creditor, to be taken: else the question must often have been before the Court as a question of notice.

The LORD CHANCELLOR during the argument made the following observations: —

As to the question upon the account, admitting that a settled account is not to be opened, unless specific errors are pointed out, will this Court permit an account to stand, where upon the face of the account the attorney admits that he has not given credit, and produced that state of his affairs that the client was entitled to have? It is the business of the attorney to keep his client's accounts.

Upon the other point, the mortgagee may convey the estate, the land vested in him, without the privity of the mortgagor; he cannot charge more money; he cannot increase the principal; he cannot make the interest principal. If either the bond or the covenant was put in suit, no doubt all money paid by the mortgagor would be set off. It struck me at first that it was quite different from the case of the bond; for that is *not [*126] assignable at law. A mortgage is a conveyance of a legal estate, though this Court only holds it a security: for what? For the money that upon the face of the mortgage appears to be due.

It is strong in my mind, that the question has been determined in bankruptcy upon a mortgage for a given sum of money, but for a floating debt; where there has been a transfer of the mortgage with other securities. West India mortgages are almost always for a floating debt; a security given for a certain sum, which is to cover what may be the balance.

In order to prevent the mortgagor from paying the interest to the mortgagee, I conceive in the common course of business no man will take an assignment of a mortgage without notice immediately after taking it to the mortgagor. Then where he gives no notice to the mortgagor, but trusts to the mortgagee for payment of his interest, does he not take it upon the credit of the mortgagee?

The mortgagor cannot call for the mortgage deed without paying the whole money. Suppose you had kept *Matthews* before the Court, and taken the common decree for a foreclosure; in taking the account, all payments made to *Shepherd* before the filing of the bill must have been allowed to *Matthews*, at least in discharge of interest; because here was no notice of the assignment but by the bill. It is a little difficult to distinguish the interest from the principal. I am not sure what is the advantage of making mortgages transferable without the knowledge of the mortgagor.

This question is new *in specie*. I will consider it, in order to think a little more upon the different bearings of it. It does seem to me not consonant to the general course of equity to consider the estate as more than a security for a debt; and I do not find the means of distinguishing between the interest and the principal.

LORD CHANCELLOR (LORD ELDON) : —

In this cause the question was only, whether the assignee of a mortgage had a right to be paid according to the sum that appeared due upon the mortgage deed, whatever might be the state of the account between the mortgagor and mortgagee. The circumstances had nothing in them so particular as to vary at all the [*127] general question. Matthews had created a * mortgage, upon which Shephard had advanced money; and Shephard being his attorney, the purpose of creating the mortgage was, that money might be raised for the use of Matthews. Shephard ought not to have made any use of the mortgage but for the purpose for which it was created; viz., to raise money for Matthews; but he thought fit to assign the mortgage without the privity of the mortgagor, and the assignee now claims to hold the mortgage to the full extent of the sum appearing due upon the face of the deed.

When the cause came on before me, a case was referred to in which it was supposed Lord THURLOW had entertained an idea, but not decided, that a mortgagor having permitted the mortgage deed without any indorsement upon it to be in the possession of the mortgagee, an assignee taking from that mortgagee might have a right to hold that mortgage to the full extent of it against the mortgagor, who permitted the mortgagee to deal with and to make a security upon it. It was also supposed that in practice there is no occasion to make the mortgagor a party; and in some cases it may not be possible to make him a party to the assignment: and that to hold that the assignee of a mortgage is bound to settle the accounts of the person from whom he takes the assignment, would tend to embarrass transfers of mortgages. I have got all the information I could, and I think I have got the best. The result is, that persons most conversant in conveyancing hold it extremely unfit, and very rash, and a very indifferent security to take an assignment of a mortgage without the privity of the mortgagor as to the sum really due; that in fact it does happen that assign-

ments of mortgages are taken without calling upon the mortgagor; but that the most usual case where that occurs is where it is the best security that can be got for a debt not otherwise well secured; and it is not in the course of transferring mortgages, but of raising money upon such securities; but no conveyancer of established practice would recommend it as a good title to take an assignment of a mortgage without making the mortgagor a party, and being satisfied that the money was really due.

With regard to the case that was quoted, I believe that, from the circumstances of the first order that was made, there might have been some doubt expressed at the time upon the point. The bill was filed by *Lunn and others*, assignees of *Lodge*, a bankrupt, *against *St. John*. According to the state of [* 128] the case I have had, *Lodge* made a mortgage to *Pitman*; who, being indebted to *St. John*, made an assignment to him for a sum less in fact than the sum due upon the mortgage. It was stamped and signed, but not sealed. *Lodge* and *Pitman* both became bankrupts. The bill was filed, insisting that nothing was due upon the account between their estates. The defendant, *St. John*, insisted that the plaintiffs must redeem him, who was a fair mortgagee, and had nothing to do with the account. Lord THURLOW in the decree gave special directions to the Master to inquire, what was due at the time of the mortgage, what was due at the time of the assignment, and what remained due; saving the point, how far *St. John* would be affected, till after the report upon that special direction. It came on upon the report before the Lords Commissioners; the Master having reported that *Pitman* was indebted to *Lodge* in £7000. By the order made upon that report, it was declared that the assignments dated the 13th of February, 1755, and — May, 1776, made by *Pitman* to the defendants, *St. John* and *Muilman*, are to be deemed null and void against the estate of *Lodge*, the bankrupt, and are to be delivered up by the defendants, *St. John* and *Muilman*, to the plaintiff, the surviving assignee of *Lodge*, to be cancelled; that all deeds and writings relating to the estate of *Lodge* be delivered up upon oath, and that the defendants join in reconveying the estate. The final result therefore was, that nothing being due upon the original mortgage, the two assignees of it took no benefit by the assignments. Therefore that case is a direct authority in favour of *Matthews*.

The cases decided, and long decided, in *Precedents in Chancery* and *Vernon* seem also to bear very much upon it; where it was made a question, now perfectly settled, that, as between the mortgagee and the persons claiming under him, without the privity of the mortgagor they cannot add to what is due, settle the account, or turn interest into principal. The mortgagee having been in possession, the assignee is bound to settle the account of the rents and profits received by the mortgagee, from whom he takes the assignment. Considering the general principles upon which this Court acts with regard to mortgages, I have no difficulty in deciding the point. It is true there is a legal estate or term; but it must be apparent upon the face of the title that it is not an absolute conveyance of the term or legal estate, but as a secur-

[* 129] ity for * a debt; and the real transaction is an assignment of a debt from A to B, that debt collaterally secured by a charge upon a real estate. The debt therefore is the principal thing; and it is obvious that if an action was brought upon the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, the account must be settled in that action. In this Court the condition of the assignee cannot be better than it would be at law, in any mode he could take to recover what was due upon the assignment.

Therefore the plaintiff must be at liberty to redeem upon payment of what the Master shall find due upon the original mortgage from him to Shephard. I will direct the account exactly in the same way as Lord THURLOW made the direction in the case I have cited; an account of what was due at the time of the mortgage, what was due at the time of the assignment, and what remains due.

The account in that case was, I apprehend, changed by transactions subsequent to the mortgage; however, I do not know that.

ENGLISH NOTES.

It is well settled that for the purpose of an assignment of a mortgage debt and the securities for the same the concurrence or consent of, or even notice to the mortgagor, is not necessary. *Jones v. Gibbon* (1804), 9 Ves. 407, 411, 7 R. R. 247. But the assignee should always either require the mortgagor's concurrence in the assignment, or at all events a written admission on his part that the state of account between the original mortgagee and the mortgagor is as alleged by the former; for

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the mortgagor, unless he concurs in the assignment or admits the account, is not bound by the account appearing by the assignment. See *Matthews v. Wallwyn*, *supra*; *Chambers v. Goldwin* (1804), 9 Ves. 254, 7 R. R. 181.

Moreover, the assignee should be careful, immediately on completion of the assignment, to give notice thereof to the mortgagor, unless he has concurred therein; for all payments made by the mortgagor to the original mortgagee after assignment and before notice would be valid and binding on the assignee. *Matthews v. Wallwyn*, *supra*; *Williams v. Sorrell* (1799), 4 Ves. 389; *Re Lord Southampton's Estate*, *Allen v. Lord Southampton* (1880), 16 Ch. D. 178, 50 L. J. Ch. 218, 43 L. T. 687, 29 W. R. 231.

As a mortgagor is not bound by the accounts as stated between the mortgagee and the assignee, so these latter parties cannot by any agreement between themselves increase the amount due on the mortgage to the prejudice of the mortgagor. So the mortgagee and assignee cannot, without the concurrence or consent of the mortgagor, convert arrears of interest paid by the assignee to the mortgagee into principal so as to be added to the mortgage debt and carry interest. *Earl of Macclesfield v. Fitton* (1683), 1 Vern. 168, 1 Ch. Cas. 68; *Ashenhurst v. James* (1745), 3 Atk. 270.

Interest cannot be converted into principal even with the consent of the mortgagor in favour of an assignee as against subsequent incumbrancers, of whose charges there is notice. *Digby v. Craggs* (1763), Amb. 611.

The concurrence of the mortgagor in the assignment or his assent thereto is of the utmost importance to an assigning mortgagee who is in possession; for if having taken possession he assigns the mortgage to another, he will be held liable to account for the rents and profits received by the assignee, on the ground that, having chosen to turn the mortgagor out of possession, he is bound to take care into whose hands he delivers the estate. *Chambers v. Goldwin* (1804), 9 Ves. 254 at p. 266, 7 R. R. 181. This liability does not, however, attach to a mortgagee in possession who transfers the security by order of the Court in a redemption action. *Hall v. Heward* (C. A. 1886), 32 Ch. D. 430, 55 L. J. Ch. 604, 54 L. T. 810, 34 W. R. 571.

Where a mortgage is absolutely void from its inception a transferee for value without notice has no better title than the original mortgagee. *Ogilvie v. Jeaffreson* (1860), 2 Giff. 353, 6 Jur. (N. S.) 970. But if the mortgage is merely voidable, as for instance if it was unconscionable or without consideration, it may become valid in the hands of a transferee for value without notice. *Newport's Case*, Cas. temp. Holt, 477, and *Judd v. Green* (1875), 33 L. T. 597.

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Though the assignee obtains the legal estate he will take subject to any equities affecting the property of which he had actual or constructive notice at the time of the transfer. *Willoughby v. Willoughby* (1756), 1 T. R. 763, 1 R. R. 397.

If the assignee gives for the mortgage less than its actual value he will nevertheless as a general rule be entitled to claim as against the mortgagor and those claiming under him payment in full of the moneys secured by the mortgage. *Phillips v. Vaughan* (1685), 1 Vern. 335.

If, however, the assignee stands in a fiduciary position to the mortgagor, as for instance if he is trustee or solicitor or other agent, he will be held to have made the purchase for the benefit of the estate and be allowed no more than what he gave for the incumbrance. *Morrett v. Paske* (1740), 2 Atk. 52, 54. So directors of a company who purchased its debentures at an undervalue were allowed only the amount actually paid with interest. *Re Imperial Land Co. of Marseilles, Ex parte Larking* (C. A. 1877), 4 Ch. D. 566, 46 L. J. Ch. 235.

A power of attorney is now unnecessary to enable the assignee to sue the mortgagor for the mortgage moneys provided the mortgagor has notice of the assignment. 36 & 37 Vict., c. 66, s. 25 (6).

The assignment of the debt will pass the benefit of all securities for the same though not expressly mentioned in the assignment, including apparently the express or statutory power of sale contained in or implied by virtue of the mortgage deed. *Boyd v. Petrie* (1872), L. R. 7 Ch. 385, 41 L. J. Ch. 378, 25 L. T. 460, 20 W. R. 513.

The validity of an assignment by way of sub-mortgage depends on that of the original mortgage; and if the mortgage is set aside the sub-mortgage will fall with it. *Cockell v. Taylor* (1851), 15 Beav. 103, 21 L. J. Ch. 545.

A sub-mortgage is good only to the extent of the amount due on the original security. *Matthews v. Wallwyn, supra*; *Ex parte Tuffnell* (1834), 4 D. & C. 29, 1 Mont. & A. 620.

AMERICAN NOTES.

This case is cited in 2 Jones on Mortgages, sects. 834, 1887, and the doctrine is approved as to a non-negotiable note or a bond to which the mortgage is collateral. *Patterson v. Rabb*, 38 South Carolina, 138; 19 Lawyers' Reports Annotated, 831. So the assignee taking after maturity of the debt takes the mortgage subject to equities between mortgagor and mortgagee. *Robeson v. Robeson*, 50 New Jersey Equity, 465.

But where the mortgage is security for the payment of a negotiable note transferred before maturity, the innocent assignee takes the mortgage free of equities. *Carpenter v. Longan*, 16 Wallace (U. S. Sup. Ct.), 271; *Taylor v. Page*, 6 Allen (Mass.), 86; *Pierce v. Fiance*, 47 Maine, 507; *Bloomer v. Hen-*

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derson, 8 Michigan, 395; 77 Am. Dec. 453; *Cornell v. Hichens*, 11 Wisconsin, 353; *Gabbert v. Schwartz*, 69 Indiana, 450; *Preston v. Case*, 42 Iowa, 549; *Burhans v. Hutcheson*, 25 Kansas, 425; 37 Am. Rep. 274; *Duncan v. Louisville* 13 Bush (Kentucky), 378; 26 Am. Rep. 201; *Bloomer v. Henderson*, 8 Michigan, 395; 77 Am. Dec. 453; *Logan v. Smith*, 62 Missouri, 455; *Webb v. Hoselton*, 4 Nebraska, 308; 19 Am. Rep. 638; *Paige v. Chapman*, 58 New Hampshire, 333; *Dearman v. Trimmer*, 26 South Carolina, 506. Even in case of fraud or duress in the execution of the mortgage collateral to a bond, *Simpson v. Del Hoyo*, 94 New York, 189; or of payment to the mortgagee after assignment: *Mead v. Leavitt*, 59 New Hampshire, 476. See *Potts v. Blackwell*, 4 Jones Eq. (No. Car.), 58; *Bennett v. Taylor*, 5 California, 502.

(In *Colehour v. State S. Inst.* 90 Illinois, 152, it was held that the assignee is subject to equities arising out of the original transaction, but not to those arising from subsequent transactions.)

In *Myers v. Hazard*, 50 Federal Reporter, 155, the Court said: "We are confronted in the outset by a conflict of authority upon the principal question. In several of the States it is held that the assignee of a negotiable note, secured by mortgage, takes the latter, as he would any other chose in action, subject to all the equities which subsisted against it while in the hands of the original holder. The argument in support of this doctrine is that a mortgage is in its nature a non-negotiable instrument, and that the rights of the parties to it cannot be fixed and determined by the law merchant. Mortgages, it is insisted, are not commercial paper, and it is not convenient to pass them from hand to hand, so that they may perform the office of money in commercial transactions, as may be done with notes, bills, and the like. It is accordingly held, in the cases now under consideration, that while the purchaser of a note secured by mortgage may be entitled to all the rights of an innocent purchaser of commercial paper, so far as the note is concerned, yet, if he seeks to foreclose the mortgage, he may be met by any defence which would have been good as against the original mortgagee. *Johnson v. Carpenter*, 7 Minn. 176; *Hostetter v. Alexander*, 22 Minn. 559; *Olds v. Cummings*, 31 Ill. 188; *White v. Sutherland*, 64 Ill. 181; *Fortier v. Darst*, 31 Ill. 212; *Sumner v. Waugh*, 56 Ill. 531; *Bailey v. State*, 14 Ohio St. 396. On the other hand it is held by the Supreme Court of the United States, and by the courts of last resort in a large majority of the States, that an assignee for value of a negotiable note secured by a mortgage, before due and without notice, takes the mortgage, as he does the note, free from equities existing between the original parties. It is said in support of this doctrine, that the note, being the principal thing, imparts its character to the mortgage. The mortgage is regarded as following the note, and as taking to itself the same qualities, so that the assignee takes the former, as he takes the latter, free from any existing equities between the original parties. A leading case upon the subject, and a controlling one, so far as the Federal courts are concerned, is that of *Carpenter v. Longan*, 16 Wallace, 271." Then follows a review of that case, and the Court conclude as follows: "The general rule announced in *Carpenter v. Longan* has been adopted in Massachusetts, Maine, Michigan, Wisconsin, Nebraska, Iowa, Missouri, and other States. See Jones on Mortgages, sect. 834, and numerous

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cases cited. But the doctrine has not yet been established as the law of New York or Pennsylvania. *Union College v. Wheeler*, 61 New York, 88; *Horstman v. Gerker*, 49 Pennsylvania State, 282.

"In many of the cases the rule is stated to be that the mortgage is regarded as following the note, and as taking the same character; but it must, of course, be understood that the mortgage takes the character of a negotiable note only in so far as in its nature it is capable of having that character imputed to it, and therefore the rule must be subject to certain modifications or exceptions. In any suit brought by the assignee of the note to foreclose the mortgage, the mortgagor may be heard to assert that the mortgage is invalid as to all or part of the property, by reason of anything that appears upon the face of the mortgage, or by reason of anything that the assignee is bound by law to know, whether the same constitutes a defence to the note or not. A third party may be heard to assert, as against the validity of such a mortgage in the hands of the assignee, that the mortgagor, at the time of the execution of the mortgage, had no power to execute it. The mortgage in the hands of the assignee, like the note, is freed from equities existing as between the original parties. This being so, no defence to the mortgage, on the ground of fraud, duress, or want of consideration, could be admitted as against the assignee; nor could the defence of payment or satisfaction, nor of a release of the mortgage, as between the original parties, nor of any other similar matter be set up. But there may, beyond question, be defences to a mortgage in such a case that cannot be defences to the note, — defences the force and effect of which cannot be determined by an appeal to the principles of the law merchant. Of this character are objections which relate to, and in the nature of the case can only relate to, the mortgage, its construction, validity, or force and effect. They may be objections which third parties only are interested in raising. We cannot give to the mortgage all the properties of negotiable paper, nor apply to it all the principles of the law merchant, without a disregard of elementary principles."

In *Carpenter v. Longan*, *supra*, the Court observed: "All the authorities agree that the debt is the principal thing and the mortgage an accessory. Equity puts the principal and accessory upon a footing of equality, and gives to the assignee of the evidence of the debt the same rights in regard to both. There is no departure from any principle of law or equity in reaching this conclusion. There is no analogy between this case and one where a chose in action standing alone is sought to be enforced. The fallacy which lies in overlooking this distinction has misled many able minds, and is the source of all the confusion that exists. The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration, and takes the case out of the rule applied to choses in action, where no such relation of dependence exists. *Accessorium non ducit, sequitur principale.*"

"*Matthews v. Wallwyn* is usually much relied upon by those who maintain the infirmity of the assignee's title. In that case the mortgage was given to secure the payment of a non-negotiable bond. The mortgage assigned the

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bond and mortgage fraudulently and thereafter received large sums which should have been credited upon the debt. The assignee sought to enforce the mortgage for the full amount specified in the bond. The LORD CHANCELLOR was at first troubled by the consideration that the mortgage deed purported to convey the legal title, and seemed inclined to think that might take the case out of the rule of liability which would be applied to the bond if standing alone. He finally came to a different conclusion, holding the mortgage to be a mere security. He said, finally: 'The debt, therefore, is the principal thing; and it is obvious that if an action was brought on the bond in the name of the mortgagee, as it must be, the mortgagor shall pay no more than what is really due upon the bond; if an action of covenant was brought by the covenantee, *the account must be settled in that action.*' In this court the condition of the assignee cannot be better than it would be at law in any mode he could take to recover what was due upon the assignment.' The principle is distinctly recognized that the measure of liability upon the instrument secured is the measure of the liability chargeable upon the security. The condition of the assignee cannot be better in law than it is in equity. So neither can it be worse. Upon this ground we place our judgment."

But to the contrary: *Bailey v. Smith*, 14 Ohio St. 396; 84 Am. Dec. 385; *Horstman v. Gerker*, 49 Penn. St. 282 (mortgage and bond); *Magie v. Reynolds*, 51 New Jersey, 113; *Palmer v. Yates*, 3 Sandford (N. Y. Super. Ct.), 137. In *Bailey v. Smith*, *supra*, which the Federal Supreme Court in *Carpenter v. Longan*, *supra*, pronounce "a case marked by great ability and fulness of research," the Court made the following remarkably able review and argument: "Does the fact that a note, obtained by fraud, has passed into the hands of a *bona fide* indorsee, entitle him to enforce a mortgage, given to the original holder, to secure its payment? Or may the mortgagor still insist upon the fraud, as a defence to an action brought to foreclose it? On the one hand, the question is in no way affected by the further question, whether a mortgagee acquires such an interest in the land as to enable his grantee, being also assignee of the note, by deed duly executed, to claim the benefit of the rule which protects *bona fide* purchasers of real estate, there being no claim that any such deed was made? And on the other, we assume as undoubted that, whether a written assignment was made or not, the assignee of the note acquired all the rights and interests of the assignor in the mortgage. Very little aid is to be derived, either from adjudged cases or the elementary books, in the solution of the precise question now before us. This is not because the purchase and assignment of mortgages is a new thing. On the contrary, scarcely any business transaction has been more common and familiar, or has oftener engaged the attention of the courts. Nor has the nature of this instrument, and the rights of parties growing out of its assignment, either alone or in connection with a non-negotiable security, escaped attention, or failed to receive very full and accurate illustration. In such cases the universally acknowledged doctrine, from the case of *Davies v. Austin*, 1 Vesey Jr. 247, to *Bush v. Lathrop*, 22 New York, 535, has been that it is to be regarded as a chose in action, and as expressed by Lord THURLOW, 'the purchaser must abide by the case of the person from whom he buys;' but during all that

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long period, neither in England, nor in any of the old States of the Union, does the question seem to have been presented, whether it might not have a different effect upon the assignment, when made to secure a negotiable instrument. This may be accounted for in part, undoubtedly, by the general practice of taking non-negotiable bond with mortgage; but it cannot be doubted that mortgages have many times been taken to secure negotiable bills and notes, fraudulently transferred; and if such a distinction was thought to exist, it seems very singular that the holders should never have made the attempt to avail themselves of such securities. In New York, the attempt has been frequently made to confine the principle that the purchaser must abide by the case of the seller to the original debtor, allowing him to make the same defence against the assignee that he could against the assignor, but protecting the assignee, without notice, from what have been denominated latent equities, or interests in third persons, not in the apparent chain of title. And this for the very plausible reason that one proposing to purchase such an instrument might inquire of the debtor whether he pretended to any defence, and make his answer estop him from afterward asserting any, but that no amount of diligence would enable him to protect himself from such latent equities. But after some vacillation in judicial opinion, the Court of Appeals, in *Bush v. Lathrop*, 22 New York, 535, repudiated the distinction, and held that the purchaser in such cases must rely upon the good faith of the seller; that he could 'take only such title as the seller had, and no other;' and that if mortgages were 'to be further assimilated to commercial paper, the Legislature must so provide.'

"But the direct question arising upon mortgages given to secure negotiable paper, has arisen in two of the new States of the West, whose Courts are entitled to high respect for their learning and ability; and it has been held that the quality of negotiability is so far imparted to such mortgages as to make them available in the hands of a *bona fide* indorser of the paper, without any regard to the equitable rights of the original parties. *Reeves v. Scully*, Walk. Ch. (Mich.) 248; *Dutton v. Ives*, 5 Michigan, 515; *Fisher v. Otis*, 3 Chandler (Wis.), 83; *Martineau v. McCollum*, 4 id. 153; *Croft v. Bunster*, 9 Wisconsin, 503. In the first of these cases, decided by the Chancellor of Michigan in 1843, no reasons are assigned, or authorities cited; and in *Dutton v. Ives*, 5 Michigan, 515, decided by the Supreme Court in 1858, the doctrine is again advanced upon the authority of *Reeves v. Scully*, Walker's Chancery Reports, 214, and the two Wisconsin cases, reported in 3 and 4 Chandler. On referring to the first case decided in that State (*Fisher v. Otis*, 3 Chandler, 83), we find it professedly based on authority, and it serves to show upon what a slender foundation a line of decisions may be made to rest. The Court say: 'This doctrine is sustained by respectable authorities, and by the reason and sound policy which have long ruled in relation to commercial paper;' and Powell on Mortgages, 908, and note, is cited. Mr. Powell certainly did suggest the question whether such a distinction might not be made. His exact position is thus stated by Mr. Coventry in the note: 'When it is said that a debt is not assignable at law, it must be understood with this restriction, that if it be secured by a negotiable instrument, such as a bill of exchange, the legal interest will pass

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by indorsement, and this has induced the learned author, in the next paragraph of the text, to suggest whether in such a case the rule as to the mortgagee's liability would apply.' The rule here referred to is that announced by Lord LOUGHBOROUGH, in the leading case of *Matthews v. Wallwyn*, 4 Vesey, 126, that the assignee of a mortgage takes it subject to all equities which could be asserted against his assignor. Now it may be fairly assumed that Mr. Powell supposed that such a distinction could be judiciously made; but it must be admitted that he had then no authority to base it upon; that neither the judicial records of England, nor of any of the old States, furnish any evidence that it has ever been adopted, and that it was first acted upon nearly half a century after the suggestion was made by a new State upon another continent. Under such circumstances, it cannot be reasonably claimed that we are at liberty to regard it as an established principle, and we can only adopt it when we are convinced that it is correct in principle, and consistent with the analogies of the law. The reasons for supposing it to be so are well stated in the case of *Croft v. Bunsler*, 9 Wisconsin, 510. The reason assigned, it is said, why the assignee can recover no more in equity than is actually due from the mortgagor to the mortgagee is, that he could recover no more at law on the bond or covenant, and the reason ceasing as to negotiable securities, the rule also ceases to have application; that the debt is the principal thing, and the mortgage the mere incident, following the debt wherever it goes, and deriving its character from the instrument which evidences the debt. To which may be added the consideration pressed upon our attention in argument, that if a recovery may be had for the debt, the mortgagor can have no interest in withdrawing the mortgaged property from liability to satisfy it. This last position is easily disposed of. If it were true, it would furnish no authority for changing the legal character and incidents of the mortgage deed; and it is evident that other lien-holders would often have a deep interest in the question. But it is not true as to the mortgagor. The right to dispose of property at the will of the owner, and to pay honest debts instead of those tainted with fraud, are valuable privileges, of which he should not be deprived without a necessity exists; and a decree upon the mortgage would very often deprive him of the benefit of the homestead law, which could not be effected by a judgment upon the fraudulent note.' It is very evident, also, that the wife of the mortgagor, in a large majority of cases, might have a deep interest in the solution of this question. Wholly incapable of becoming a party to any commercial contract whatever, she may nevertheless convey her estate, or release her dower, by way of mortgage for the security for her husband's negotiable paper. If the mortgage is to be deemed negotiable in the hands of the assignee of the paper, we see no escape from the conclusion that the mortgage must be enforced against her, however gross and palpable the fraud may be by which it was obtained.

“In a general sense, it may be very well and very correct to speak of a mortgage as an incident to the debt it is created to secure; but the importance of this mere term may be easily overrated. It certainly is not one of the incidental effects of the creation of the debt itself, and it can only be made to have relation to the debt by the force of the contract contained in the mortgage: and

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is incident to the debt only in the same sense that every independent contract, having for its object the payment or better security of the debt, is incidental to it. The existence of the debt is the occasion out of which they arise, and the subject of their various provisions; but they embrace all the elements of a perfect contract in themselves, and are enforced by appropriate remedies according to their own stipulations. At law, a mortgage effects the conveyance of an estate upon condition, but in the view of a Court of equity, where alone the rights of an assignee can be enforced, it is a chose in action, having no negotiable quality, and not differing in character from collateral personal agreements, designed to effect the same object. Any of these collateral agreements may be entered into for the purpose of securing a debt evidenced by a negotiable instrument; and if they are not obtained by fraud, and rest upon a sufficient consideration, in the absence of any agreement to the contrary, they undoubtedly inure in equity to the benefit of any owner of the debt. But the question here is, whether one of these collateral agreements, made to secure a negotiable note, loses its character of a mere chose in action, and has imparted to it the qualities of negotiability, so that upon the transfer of the note it may be enforced, although obtained by fraud. This question has been repeatedly answered in respect to a class of collateral agreements much more intimately connected with the negotiable instrument than is the mortgage deed. We refer to guaranties indorsed upon the note itself. Passing by those which have been claimed to be such, but held by the Courts to be mere indorsements, or original contracts, with apt words of negotiability incorporated in them, the universal doctrine has been that the legal title does not pass upon the transfer of the note; that they are mere non-negotiable choses in action, and to be treated in every respect as such. *Lamourieux v. Hewit*, 5 Wendall, 307; *McLaren v. Watson*, 26 id. 425 (37 American Decisions, 260); *Miller v. Baston*, 2 Hill, 188. In the first of these cases, Chief Justice SAVAGE says: 'Promissory notes are negotiable only by virtue of the statute, but this negotiable quality is not extended to any other instrument relating to the note'; and BRONSON, J., in the last, in support of the same position, says: 'But the guaranty itself is not a negotiable instrument, and cannot be transferred to a third person, so as to give him a legal title to proceed in his own name against the guarantor. As in the case of other contracts which are not in their own nature assignable, the remedy upon the guaranty is confined to the original parties to the instrument.' We have said that these instruments are much more intimately connected with the note than is a mortgage deed. This will be apparent when it is remembered that the one ordinarily guarantees the particular instrument specified in it, and does not survive a renewal or other change of the evidence of indebtedness; while the other secures the debt whatever changes may intervene until it is paid; and even a positive statutory bar which precludes a recovery upon the note, it has been held, does not prevent the enforcement of the mortgage. *Fisher v. Mossman*, 11 Ohio State, 42.

"In order to sustain the judgment rendered in this case, it is indispensably necessary to affirm, either that the mortgage, when made to secure a negotiable note, contrary to its general nature and qualities, becomes a negotiable

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instrument, or that the transfer of such a note, without the aid of any statute, or of any judicial decision, except those of very recent date, has an effect beyond the note itself, and draws after it and within one of the most important incidents of negotiability, — a collateral contract having relation to the same debt. A very careful consideration of the whole subject has convinced us that we have no power to do either; and that neither justice nor public policy would be promoted by making the attempt. It certainly has never been thought to be within the province of a Court to determine what instruments should be taken from the list of mere choses in action, and clothed with the attributes of negotiability. Bills, foreign and inland, assumed this position upon the immemorial custom of merchants, and were adopted into the law upon the reasons which availed to make up the great body of the common law. But the statute, 3 & 4 Anne, was found necessary to place promissory notes upon the same footing; and from that day to this, neither in England nor in this country, has an instrument been added without express legislative sanction. Indeed, this could not be otherwise. The necessities of commerce, and the instruments best calculated to answer its purposes, must all be considered before any intelligent decision could be made. These are legislative functions, requiring experience and extensive information, and calling for the exercise of a discretion wholly incompatible with the fixed certainty of judicial decision. But if it were otherwise, and the discretion rested with us, we could not introduce the mortgage deed into the list of negotiable instruments without disregarding the very foundation principles upon which such paper has always been supposed to rest. From the case of *Miller v. Race*, 1 Burroughs English King's Bench Reports, 452, to the very latest case in our Reports, the language of the Courts has been uniform, that such paper is only allowed in the interests of commerce, and 'possessing some of the attributes of money,' to answer the purposes of currency. Lord MANSFIELD, in answer to the 'ingenious' argument of Sir Richard Lloyd, that the plaintiff could take nothing by assignment from a thief who had stolen the paper, said the fallacy of the argument consisted in comparing banknotes to what they did not resemble. 'They are not goods,' he said, 'not securities, nor documents for debt, nor are so esteemed; but are treated as money, — as cash, — in the ordinary course and transaction of business, by the general consent of mankind'; 'the course of trade creates a property in the assignee or bearer,' and they cannot be recovered 'after they had been paid away in currency, in the usual course of business.' This was said, it is true, of banknotes; but the same principles, and for the same reasons, were afterward applied by the same learned Judge to every description of negotiable paper, and the case of *Miller v. Race*, 1 Burr. 452, is still the leading authority upon this branch of commercial law.

"Now, mortgages are not necessities of commerce; they have none of the 'attributes of money': they do not pass in currency in the ordinary course of business, nor do any of the prompt and decisive rules of the law merchant apply to them. They are 'securities,' or 'documents for debts,' used for the purposes of investment, and unavoidably requiring from those who would take them with prudence and safety, an inquiry into the value, condition, and

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title of the property upon which they rest ; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defence, before a Court will foreclose his right to defend against those which have been obtained by force or fraud.

“Against any amount of mere theory, advanced to sustain the position that commerce requires these instruments to be invested with negotiable qualities, may be successfully opposed the stubborn fact, that in the first commercial country of the world, as well as in the great commercial States of the American Union, they have never been used for such purposes or heard of in such a connection. It is quite immaterial whether this has arisen from the cause supposed, — that they are never made to secure negotiable paper, — or not, since it equally shows that no necessity for their use has ever been felt. A long experience has demonstrated that they are not necessary instruments of active trade and business ; and we but follow in the footsteps of the ablest and wisest Judges when we say that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. This remits them to the position they have so long occupied, that of mere choses in action ; and whether standing alone, or taken to secure negotiable or non-negotiable paper, they are not only available for what was honestly due from the mortgagor to the mortgagee. If they are assigned, either expressly or by legal implication, the assignee takes only the interest which his assignor had in the instrument, — acquires but an equity, and, upon the long-established doctrine in Courts of equity, is bound to submit to the assertion of the prior equitable rights of third persons. To hold otherwise, is to ingraft legal incidents upon a mere equitable title, to give to the transfer of negotiable paper an effect beyond what it imports, or is necessary in the accomplishment of its legitimate purposes, and finally, to invest with negotiable qualities a class of instruments, neither used for nor adapted to the trade and commerce of the country, and thereby to deprive the mortgagor of the just right of defending against fraud without subserving any public policy whatsoever.”

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IF two or more distinct mortgages of different estates are vested in the same person, or if a mortgage is made of one estate, and afterwards a mortgage is made of another estate to secure the same sum with further advances, the mortgagee or his transferee, so long as both securities are subsisting, may insist that all the mortgages shall be redeemed together.

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1896, A. C. 187-199 (s. c. 65 L. J. Ch. 449; 74 L. T. 323; 44 W. R. 589).

Mortgage. — Redemption. — Consolidation. — Assignment of Equity [187]
of Redemption by one Deed to one Person.

The doctrine of consolidation of mortgages laid down in *Vint v. Padget* (2 D. & J. 611) and other cases to the same effect has been too long established to be now overthrown.

Therefore where the owner of different properties mortgages them to different persons and the mortgages afterwards become united in title, the holder of the mortgages has a right to consolidate them, and to refuse to be redeemed as to one without payment of what is due to him on all, not only as against the mortgagor, but also as against a person to whom the mortgagor has by one deed assigned the equity of redemption of all the properties, although the assignment is made before the mortgages become united in title.

The decisions of ROMER, J., and the Court of Appeal ([1894], 2 Ch. 328; [1895], 1 Ch. 51) affirmed.

The following statement of the facts is taken from the judgment of Lord DAVEY :—

Seven different properties are involved in this appeal. There were originally eight, but one of the properties, known as 1 and 2 Shakespeare Terrace, has been dealt with in a separate suit, and the rights of the appellants and respondents in respect of that property are not now in question. One James Banks was the original owner and mortgagor of all these seven properties. James Banks mortgaged 34 Bouverie Square (which I will refer to as No. 1) and 5 and 6 Shakespeare Terrace (which I will refer to as No. 2) to John Banks, by deeds dated respectively May 11 and August 26, 1863. He mortgaged Pembury Villa (which I will refer to as No. 3) on October 12, 1865, to S. Hobday, and the other four properties (which I will refer to as Nos. 4, 5, 6, and 7) to other mortgagees by deeds dated from October 18, 1865, to November 24, 1866. * He then made a second [*188] mortgage to Brockman of 4, 5, 6, and 7, by a deed dated November 27, 1866. He then made a second mortgage of Nos. 1, 2, and 3, and a third mortgage of 4, 5, 6, and 7, to Brockman and Harrison by one deed, dated August 20, 1868. Or, in other words, on that date James Banks assigned the equity of redemption on all seven properties to Brockman and Harrison. At that date, therefore, Brockman and Harrison might have redeemed 1,

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2, or 3, without redeeming the other properties; but they could not have redeemed either 4, 5, 6, or 7, without redeeming all those four properties. Pledge, the present plaintiff and appellant, became the transferee from Brockman and Harrison of their equity of redemption of all the seven properties on April 1, 1885. In the meantime, Brockman, by deeds dated from 1871 to 1873, became the transferee of the first mortgages on Nos. 1, 2, 4, and 5. The defendants and respondents are the surviving executors of Brockman, who died in 1877, and on December 27, 1890, they became the transferees of the first mortgage on No. 3. From that date, therefore, the equity of redemption on all seven properties was vested in the appellant, subject to mortgages on the several properties all vested in the respondents.

In these circumstances, on March 30, 1893, the appellant issued his writ in this action, by which he claims a declaration that he is entitled to redeem No. 2 alone on payment of what is due on the first mortgage of that property only. The defendants claim to consolidate their mortgages on all the seven properties, and that the appellant cannot redeem No. 2 without redeeming their mortgages on the other six properties also.

ROMER, J., made an order declaring that, as between the plaintiff and defendants only and without prejudice to the rights of any parties not represented, the plaintiff could not redeem any of the properties until payment to the defendants of what on taking the accounts thereby directed should be certified to be due to them on all the mortgages of May 11, August 26, 1863, October 12, 1865,

and November 27, 1866, and that accounts should be [* 189] taken accordingly: in default of payment action * to be dismissed.¹ This order was affirmed by the Court of Appeal (Lord HERSCHELL, L.C., LINDLEY and A. L. SMITH, L.JJ.) (1895), 1 Ch. 51.

Against these decisions the plaintiff brought the present appeal.

1895. Nov. 19, 21. Levett, Q.C., and Branwell Davis, Q.C. (Cator with them), for the appellant. The action was brought to redeem No. 2 alone, but the appellant now admits that the defendants are entitled to consolidate the mortgages on Nos. 1 and 2, because those mortgages were vested in one mortgagee, John Banks, before the assignment of the equity of redemption to the appellant's predecessors in title; but he claims to redeem those

¹ Reported as *Pledge v. Carr* (1894), 2 Ch. 328. Carr died after action brought.

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properties without redeeming any of the others because the mortgages on the others were at the date of that assignment vested in different persons. The appellant's rights cannot be defeated or altered by transactions subsequent to that assignment to which the appellant was not a party. The contingency of a right to consolidate arising out of the subsequent union of the mortgages is not an equity. The only equity affecting Nos. 1 and 2 was the right of John Banks to consolidate the mortgages on 1 and 2 granted to him. There was no right of consolidation against the mortgagor; the assignee cannot equitably or justly be placed in a worse position than the mortgagor: whatever rights the mortgagor had passed to his assignee who ought not to be deprived of them through what was no fault of his. The right to consolidation is a personal equity only, and the position of a second mortgagee cannot be prejudiced by the subsequent union in one person of mortgages which were previously in several: *White v. Hillacre*, 3 Y. & C. Ex. 597, approved in *Jennings v. Jordan*, 6 App. Cas. 698. The equity being a personal equity cannot extend to transferees, much less to executors who are mere volunteers. There is no equity affecting the property itself: *Harter v. Colman*, 19 Ch. D. 630; *Minter v. Carr* (1894), 2 Ch. 321, 3 Ch. 498, in both of which the doctrine was held inapplicable against

* assignees of the equity of redemption. The Courts [* 190] below felt themselves bound by *Vint v. Pudget*, 1 Giff. 446, 2 D. & J. 611, though Lord HERSCHELL in this case and LINDLEY, L.J., in *Minter v. Carr*, had manifestly grave doubts whether it was good law. TURNER, L.J., in *Vint v. Pudget* could not distinguish the case from *Bovey v. Skipwith*, 1 Ch. Ca. 201, in the 23rd Charles II. But that case, as well as *Titley v. Davies*, 2 Y. & C. Ch. 399, before Lord HARDWICKE, are really cases of tacking and not consolidation. *Tussell v. Smith*, 2 D. & J. 713, 27 L. J. Ch. 694, is overruled by *Jennings v. Jordan*. In *Baker v. Gray*, 1 Ch. D. 491, HALL, V.-C., decided against consolidation, and treated *Vint v. Pudget* as being purely a question of notice. *Tweeddale v. Tweeddale*, 23 Beav. 341, and *Vint v. Pudget* are the only decisions adverse to the appellant, and they are open to review in this House and should be overruled. There is neither reason nor principle in such a doctrine, and it ought to be abolished.

Cozens-Hardy, Q.C., and Edwin Ward, for the respondents, were not heard.

The House took time for consideration.

March 26. Lord HALSBURY, L.C. — My Lords, I have had an opportunity of considering the judgment prepared by my noble and learned friend (Lord DAVEY) and I am not prepared to dissent from it. I use that form of expression because I confess I lament the conclusion to which it has been found necessary to come, although I believe the strict principle upon which it rests is founded in our law at present, and in dealing with a technical system it is better to adhere to a principle when once established, than to create greater confusion by dissenting from it. I think the principle laid down in *Vint v. Padget* has been so firmly established now by authority in our technical system, that I feel more mischief would be done by dissenting from it, than by acquiescing in it. For these reasons I am content with [* 191] the judgment which my noble *and learned friend has prepared, and shall assent to the motion that he will make.

Lord WATSON. — My Lords, I also have had an opportunity of carefully considering the judgment about to be delivered by my noble and learned friend opposite. For my own part, I should have desired if possible to decide otherwise; but I am compelled to say that I concur with the reasonings and the conclusion of my noble and learned friend.

Lord DAVEY. — My Lords, the facts of this case are complicated, but they may be stated in a narrow compass sufficiently for elucidating the point of law which is raised. [His Lordship stated the facts given above.] It was admitted at the Bar that the respondents had the right to consolidate their mortgages on Nos. 1 and 2, because the mortgages on those properties were vested in one mortgagee, John Banks, before the assignment of the equity of redemption in both to Brockman and Harrison, the appellant's predecessors in title; but the appellant contends that they are not entitled to consolidate their mortgages on 3, 4, 5, 6, and 7 with their mortgage on No. 2, because these mortgages did not become united in title with the mortgage which he desires to redeem on No. 2 until after the date on which the equity of redemption was assigned to his predecessors in title, namely, August 20, 1868, and his counsel argues that the rights of the appellant and respondents must be determined by the state of circumstances at that date. The question for your Lordships' decision is whether the

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respondents have the right of consolidation which they claim, notwithstanding that the mortgages which it is sought to consolidate were not united in title with the mortgage sought to be redeemed until after the assignment of the equity of redemption to the present appellant's predecessors in title.

ROMER, J., by whom the action was tried, and the Court of Appeal, held that the case was covered by the decision of KNIGHT BRUCE and TURNER, L.JJ., in the year 1858, in *Vint v. Padget*, which it was not competent for them to question, * and accordingly decided in favour of the respondents. [* 192] The appellant's counsel admit that they cannot distinguish the present case from that decision, but contend that it is wrong and ought to be reversed by your Lordships.

The equitable rule as to the consolidation of mortgages is not one of those doctrines of the Court of Chancery which has met with general approbation — at any rate as regards its later development. Originally it may have been a right of a mortgagee holding two separate mortgages on estates of the same mortgagor which have become absolute estates at law against the mortgagor and debtor personally to refuse to be redeemed as regards one estate without having his other debt also paid. But it has long been settled that the right of consolidation may be exercised by the transferee of the mortgages as well as by the original mortgagee, and may be exercised in respect of equitable mortgages as well as by a mortgagee holding the legal estate absolute at law; and on the other hand, that it may be asserted against the assignee of an equity of redemption from the mortgagor as well as against the mortgagor himself.

If *Vint v. Padget*, 2 D. & J. 611, had been an isolated decision on a new point, then, notwithstanding the eminence of the learned Judges who were parties to the decision, it may be that your Lordships would have felt disposed to review it; and if it did not appear to your Lordships a necessary or legitimate development of the doctrine, your Lordships would probably be disposed to express your dissent from it, as was done with regard to another decision of the same learned Judges by this House in the case of *Jennings v. Jordan*, 6 App. Cas. 698. But it is obvious that the learned Judges did not conceive themselves to be laying down new law. KNIGHT BRUCE, L.J., said that a long course and series of authorities binding on the Court precluded the possibility of their think-

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ing that there was in the case more than one arguable question, if any, namely, as to the materiality of notice of a second mortgage to a transferee of prior mortgages, and TURNER, L.J., said it was impossible to distinguish the case from *Bovey v. Skipwith*, [* 193] 1 Ch. Ca. 201 (a case decided in the *reign of Charles II., to which I will presently refer), on any other ground than as to notice being material.

In *Tweedale v. Tweedale*, 23 Beav. 341 (decided in 1857, the year before *Vint v. Padget*), the union of two mortgages made to different mortgagees took place after the assignment of the equity of redemption of both mortgaged properties to the same person. Lord ROMILLY held that the assignee could only stand in the position of the mortgagor, and be entitled to his rights only; and if the mortgagor could not have redeemed one property without the other, the assignee stood in no better or more favourable position, and was not entitled to redeem one without redeeming the other. Indeed, the contrary seems from the report to have been scarcely argued in that case.

The case of *Vint v. Padget* came before STUART, V.-C., in the first instance, whose judgment may be referred to as showing how entirely that experienced Judge considered the point to be settled. "In accepting," he says, "by way of security the equity of redemption of two separate estates, Mr. Lee deliberately incurred the risk of their uniting in one hand; and when that union has taken place there is only one single debt, and in order to redeem he must pay off both mortgages, each of which affects the entirety of both estates."

The old case of *Bovey v. Skipwith*, referred to by TURNER, L.J., was a combined case of tacking (in the strict technical sense) and consolidation. There was (1.) a mortgage (apparently) with conveyance of the legal estate on two properties; (2.) an assignment of the equity of redemption in the two properties to a second mortgagee; (3.) a third mortgage of one of the properties only without notice of the second mortgage. The third mortgagee bought and took a transfer of the first legal mortgage. It was held, first, that he might tack his equitable third mortgage to the first mortgage, so as to gain priority over the second mortgagee, and secondly, that having done so he might consolidate his third mortgage (which was on one estate only) with the first [* 194] mortgage on both estates and hold the two *estates as

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against the second mortgagee until all that was due to him on both securities should be satisfied.

The case of *Titley v. Davies*, 2 Y. & C. Ch. 399, before Lord HARDWICKE, may be distinguished on the ground that Titley, the second equitable mortgagee of one of the estates, had before the assignment of the equity of redemption in another estate to Peyton, acquired a right to redeem Shephard, the first mortgagee on both estates, and thereby consolidate the two mortgages. It is not, therefore, in my opinion, a direct authority on the present case, in which the consolidation has taken place by purchase and transfer, and not by the exercise of an existing right to redeem.

In *Selby v. Pomfret* (1861) before WOOD, V.-C., 1 J. & H. 336, and before CAMPBELL, L.C., 3 D. F. & J. 595, the facts, so far as material for the present purpose, were: (1.) mortgage to defendants of leasehold premises in Mark Lane on June 26, 1858; (2.) mortgage to Stileman and Neale of leasehold premises in Herne Hill on February 1, 1859; (3.) mortgagor became bankrupt February 9, 1859; (4.) transfer of the Herne Hill mortgage to defendants February 16, 1859, and therefore after the bankruptcy of the mortgagor. The VICE-CHANCELLOR held that the defendants were entitled to consolidate the two mortgages against the assignees in bankruptcy of the mortgagor, and to retain the balance due on the Mark Lane mortgage, which was deficient, out of the surplus proceeds of sale of the Herne Hill mortgage. Lord CAMPBELL, in affirming the VICE-CHANCELLOR's decree, said: "It does seem strange that mortgagees after the bankruptcy of the mortgagor should be allowed by their own act to vary the rights of themselves and the other creditors of the mortgagor, so as to obtain payment in full of a debt in respect of which, at the time of the bankruptcy, they were only entitled to a dividend along with the body of unsecured creditors. But it is settled that a mortgage executed by a bankrupt before his bankruptcy, where the value of the land mortgaged exceeds the sum secured, is upon the bankruptcy of the mortgagor, to be considered *tabula in naufragio*, and if the assignees do not immediately *redeem, any [*195] mortgagee of the bankrupt whose security is insufficient, may take an assignment of the mortgage and tack to it the debt due under the mortgage to himself. Therefore the VICE-CHANCELLOR truly observes: 'The fact of the bankruptcy before the defendants took the transfer made no difference. Any one might

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seize the plank. The assignees might have got the benefit of it if they had been quick enough; but the defendants were more alert.'” And see *Nere v. Pennell*, 2 H. & M. 170.

Although the LORD CHANCELLOR uses the word “tack,” it is apparent from the facts of the case which he was dealing with that he meant tacking in the sense of consolidation. The case of *Selby v. Pomfret*, 1 J. & H. 336, 3 D. F. & J. 595, may, no doubt, be distinguished from the present one on the ground that the assignment of the equity of redemption was by operation of law, but if there was no existing right of consolidation at the date of the bankruptcy, the distinction seems to me unsubstantial, because the assignees of the bankrupt take his property subject only to existing equities. The statutory *jus tertii* of the creditors may be considered as entitled to more consideration and not less than the right of a particular assignee.

In *Beeror v. Luck* (1867), L. R. 4 Eq. 537, Woon, V.-C., held that a mortgagee of one property might, as against the assignee of the equity of redemption of another property, consolidate with his mortgage a mortgage from the same mortgagor on that other property of which he had taken a transfer after the date of the assignment of the equity of redemption of the second property only, overruling the case of *White v. Hilluere*, 3 Y. & C. Ex. 597.

The extent to which the right of consolidation was carried in this case was criticised by Lord SELBORNE in this House in *Jennings v. Jordan*, 6 App. Cas. 698, and so far as it held that mortgages on two properties could be consolidated against the assignee of the equity of redemption of one property only, where the union of the two mortgages did not take place until after the separation

of the equities of redemption, the case of *Beeror v. Luck* [* 196] must * be held to be overruled. It was so considered by FRY, J., in *Harter v. Colman*, 19 Ch. D. 630.

This case is free from any such difficulty. At the time when redemption is sought, all the mortgages are presently redeemable by the same person. Pledge, the plaintiff in the action, became by one transaction the assignee of the entire equity of redemption of all the mortgages. An attentive consideration of Lord SELBORNE's judgment has satisfied me that the noble and learned Lord did not intend to throw any doubt upon the application of the doctrine in such circumstances.

The actual point decided in *Jennings v. Jordan* was, that a

No. 34. — Pledge v. White, 1896, A. C. 196, 197.

mortgagee could not as against the assignee of an equity of redemption of one property consolidate with his original mortgage a mortgage on another property created by the same mortgagor after the assignment of the equity of redemption. The contrary had been maintained by the defendant on what was probably a misunderstanding of the case of *Tassell v. Smith*, 2 D. & J. 173. "I take it," said Lord BLACKBURN, "that the only question before this House is, whether where the mortgage on one property is not created till after the equity of redemption in the other property has been parted with, there is as against the purchaser an equity to consolidate the two." Their Lordships also discussed the question whether in a case where the equities of redemption have become separated, consolidation could take place against the assignee of one equity of redemption only by subsequent union of two mortgages, and they preferred the decision in *White v. Hillacre* to that of WOOD, V.-C., in *Beevor v. Luck*.

Lord SELBORNE expressed himself in the following words: "A mortgagee who holds several distinct mortgages under the same mortgagor, redeemable not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may, within certain limits and against certain persons (entitled to redeem all or some of them) *consoli- [* 197] date them — that is, treat them as one, and decline to be redeemed as to any unless he is redeemed as to all. This doctrine of consolidation is well established and cannot now be altered except by the Legislature, whether it originally rested on a sound equitable foundation or not. The present question is as to its proper limits. There is no difficulty in its application when all the mortgages, whether originally made to the same mortgagee or having come into a single hand by subsequent assignments, are redeemable at the same time by the same person. Its extension to a case in which after that state of things has once existed the equities of redemption have become separated by the act of the person in whom they had been combined, though it may perhaps be open to objection on some practical grounds, rests upon an intelligible principle."

After discussing the principle on which such an extension can be defended, Lord SELBORNE continues: "In the present case the rights of redemption existing at the date of the settlement of 1838 could not, in my opinion, have been properly worked out (unless

by some voluntary arrangement between the parties interested) otherwise than by consolidating all the mortgages now vested in the appellant Jennings, which were prior in their creation to December 3, 1838, as they have been, in fact, consolidated by the decree of the Court of Appeal." The date mentioned by Lord SELBORNE, I may observe, was the date on which the assignment of the equity of redemption was made to the appellant's predecessor in that case. "I have much more difficulty in following or satisfactorily explaining the principle of some other authorities (such as *Beever v. Luck*, L. R. 4 Eq. 537) which have held (contrary to the decision of Baron ALDERSON in *White v. Hillacre*, 3 Y. & C. Ex. 597), that a mortgagee's right to consolidate as against the purchaser of the equity of redemption of property mortgaged to him is capable of being enlarged, after the date of that purchase, by a transfer to the mortgagee of other mortgages which were then in other hands, and with the equity of redemption of which (if there were no consolidation) the purchaser would have nothing to do."

I understand Lord SELBORNE to be here speaking only of [*198] the *case in which the equities of redemption have become separated, and his observations have no reference to a case such as that now before the House, in which all the equities of redemption have been assigned to, and are now vested in, one person. I do not think that anything was said in this House in *Jennings v. Jordan*, 6 App. Cas. 698, which throws any doubt or discredit on the decision in *Vint v. Padget*, 1 Giff. 446, 2 D. & J. 611, and the other cases to the same effect. At the time when this action was commenced the exact position contemplated by Lord SELBORNE had taken place — of all the mortgages being united in a single hand and redeemable by the same person.

It appears to me, my Lords, that an assignee of two or more equities of redemption from one mortgagor stands in a widely different position from the assignee of one equity only. He knows, or has the opportunity of knowing, what are the mortgages subject to which he has purchased the property, and he knows that they may become united by transfer in one hand. If the doctrine of consolidation be once admitted, it appears to me not unreasonable to hold that a person in such a position occupies the place of the mortgagor or assignor to him towards the holders of the mortgages, subject to which he has purchased, although it may

No. 34. — *Pledge v. White*, 1896, A. C. 198, 199. — Notes.

be unreasonable to hold that he can be affected by the transfer to such holders of mortgages to other persons by the same mortgagor on property which he has not purchased, and with the equity of redemption of which he has no concern. He does not investigate the title to such other property and cannot know in the latter case to what mortgages the property is subject. If your Lordships affirm the decree now under appeal, the doctrine of consolidation will be confined within at least intelligible limits. It will be applicable where at the date when redemption is sought all the mortgages are united in one hand and redeemable by the same person, or where after that state of things has once existed the equities of redemption have become separated. If the purchaser of two or more equities of redemption desires to prevent consolidation, he has it in his power to redeem any one mortgage before consolidation takes place; but if for his own convenience he delays * doing so, he runs the same risk as his assignor [* 199] ran of the mortgages becoming united by transfer in one hand.

I am of opinion that the application of the doctrine of consolidation to a case like the present has been too long considered part of the equitable jurisprudence of this country to be altered at the present time, and it is not so unreasonable as to demand a reversal of it by this House.

I move, therefore, that this appeal be dismissed with costs.

Order of the Court of Appeal and judgment of Romer, J., affirmed and appeal dismissed with costs.

Lords' Journals, March 26, 1896.

ENGLISH NOTES.

The judgment of Lord DAVEY in the above Ruling Case is well worthy of attentive study as containing a lucid exposition of the doctrine of consolidation and an elaborate review of the previous authorities on the subject.

"The whole doctrine of consolidation, whatever may have been the particular circumstances under which it has been applied to different cases, arises from the power of the Court of equity to put its own price upon its own interference as a matter of equitable consideration in favour of any suitor." *per* JAMES, L. J., in *Cummins v. Fletcher* (C. A. 1880), 14 Ch. D. 699 at p. 708, 49 L. J. Ch. 563, 42 L. T. 859, 28 W. R. 772.

The right to consolidate exists whether the mortgages are legal

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or equitable. *Tweeddale v. Tweeddale* (1857), 23 Beav. 341; *Nere v. Pennell* (1863), 2 H. & M. 170, 33 L. J. Ch. 19.

The right of consolidation is the right of the mortgagee, not of the mortgagor: the mortgagor cannot compel the mortgagee to consolidate. *Pelly v. Wathen* (1851), 1 De G. M. & G. 16.

It has long been settled that where several estates have been separately mortgaged as securities for distinct debts by one mortgagor to one mortgagee the mortgagor cannot redeem one mortgage without redeeming all. *Shuttleworth v. Laycock* (1684), 1 Vern. 245. And the same rule applies where several mortgages originally made to different mortgagees have come by transfer into the hands of one person. *Titley v. Davies* (1743), 2 Y. & C. C. C. 399 *n*.

The right of consolidation applies where the equities of redemption in the different mortgaged estates have become vested in different persons by assignment or otherwise, and is enforceable against the assignee of the mortgagor though he has no notice of the existence of the right. *Jones v. Smith* (1794), 2 Ves. Jr. 372; *Jennings v. Jordan* (H. L. 1881), 6 App. Cas. 698 at p. 701, 51 L. J. Ch. 129, 45 L. T. 593, 30 W. R. 369.

Where however several mortgages on different estates do not become united in the same person until after the equity of redemption in one of the estates has been assigned by the mortgagor, the holder of the mortgages will not have a right to consolidate. *Harter v. Colman* (1882), 19 Ch. D. 630, 51 L. J. Ch. 481, 46 L. T. 154, 31 W. R. 484. See *Minter v. Carr* (C. A.) 1894, 3 Ch. 498, 63 L. J. Ch. 705, 71 L. T. 526.

There can be no right to consolidate where the equity of redemption of one of the estates was assigned before the mortgage on the other estate was in existence. *Baker v. Gray* (1875), 1 Ch. D. 491, 45 L. J. Ch. 165, 33 L. T. 721, 24 W. R. 171. See *Jennings v. Jordan*, *supra*.

A mortgagee may consolidate his securities as against a person to whom all the equities of redemption have been assigned, although the assignments or some of them may have taken place before the union of the mortgages in the same mortgagee. *Vint v. Pudget* (1858), 2 De G. & J. 611.

A mortgagee cannot consolidate two mortgages vested in him as against the purchaser of the equity of redemption in one of the mortgaged estates, if the sale took place before the mortgage of the other estate was made. *Jennings v. Jordan*, *supra*.

The doctrine of consolidation does not apply unless the mortgaged estates belong to the same person or to those claiming under him. *Jones v. Smith*, *supra*; *Higgins v. Frankis* (1846), 15 L. J. Ch. 329; *Bowker v. Bull* (1850), 1 Sim. (N. S.) 29, 20 L. J. Ch. 47.

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The right to consolidate is lost if the several mortgages become vested in several assignees of the mortgagee. *Ca. and Ap. M. S.* 78. Also if one of the mortgages has ceased to exist. *Re Baggett, Ex parte Williams* (C. A. 1880), 16 Ch. D. 117, 50 L. J. Ch. 187, 44 L. T. 4, 29 W. R. 314.

So far as relates to mortgages which are, or one of which is, made on or after the 1st of January, 1882, it is enacted by the Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c. 41), s. 17, that there shall be no right of consolidation in the absence of a contrary intention expressed in the mortgages or one of them. *Bird v. Wenn* (1886), 33 Ch. D. 215, 55 L. J. Ch. 722, 54 L. T. 933, 34 W. R. 652.

AMERICAN NOTES.

The general rule is that a mortgagee may not be compelled to divide his debt and security. *Merritt v. Hosmer*, 11 Gray (Mass.), 276; 71 Am. Dec. 713; *Gliddon v. Andrews*, 14 Alabama, 733; *Street v. Beal*, 16 Iowa, 68; 85 Am. Dec. 504; *Spurgin v. Adamson*, 62 Iowa, 661; *Robinson v. Fife*, 3 Ohio St. 551; *Casler v. Byers*, 129 Illinois, 657; *Andreas v. Hubbard*, 50 Connecticut, 351. See 2 Jones on Mortgages, sect. 1072; 3 Pomeroy Eq. Jur., sects. 1220, 1221.

So he may not be compelled to receive payment in part from different subsequent grantees. *Smith v. Kelley*, 27 Maine, 237; 46 Am. Dec. 595; *Mulanphy v. Simpson*, 4 Missouri, 319; *Lyon v. Robbins*, 45 Connecticut, 513; *Meacham v. Steele*, 93 Illinois, 135; *Coffin v. Parker*, 127 New York, 117.

The rule is the same where two distinct estates are separately mortgaged. *Franklin v. Gorham*, 2 Day (Connecticut), 142; 2 Am. Dec. 86.

So where a purchaser has assumed two mortgages, each on an undivided half. *Wells v. Tucker*, 57 Vermont, 223.

Where a mortgage rests on land owned by several so that their equities as between themselves are equal, one who has redeemed may compel contribution from the others. 3 Pomeroy Eq. Jur., sect. 1222, citing many cases.

A mortgagor going into equity to redeem must pay all debts due from him to the mortgagee. *Lee v. Stone*, 5 Gill & Johnson (Maryland), 1; 23 Am. Dec. 589; *Chamberlain v. Thompson*, 10 Connecticut, 243; 26 Am. Dec. 390. But when the mortgagee seeks to foreclose, the mortgagor may redeem on paying the mortgage debt alone. *Lee v. Stone, supra*.

If F., S., and W. are co-tenants of a junior mortgagee, and F. owns a prior mortgage in severalty, if S. and W. sue to redeem, they must pay the whole of the prior mortgages. *Saunders v. Frost*, 5 Pickering (Mass.), 259; 16 Am. Dec. 394.

No. 35. — *Rogers v. Challis*, 27 Beav. 175. — Rule.

SECTION V. — *Equitable Rules in favour of the Mortgagor.*

No. 35. — ROGERS *v.* CHALLIS.

(CH. 1859.)

No. 36. — SICHEL *v.* MOSENTHAL.

(CH. 1862.)

RULE.

SPECIFIC performance will not be enforced of an executory agreement either to borrow or lend money.

Rogers v. Challis.

27 Beavan, 175–180 (s. c. 29 L. J. Ch. 240; 6 Jur. N. S. 134).

Agreement for Loan on Mortgage. — No Equity to Enforce.

[175] A Court of equity will not decree the specific performance of a contract to borrow a sum of money on mortgage.

In a case where the Court has no jurisdiction to grant a specific performance of a contract, it has no jurisdiction under the 21 & 22 Vict., c. 27, to award and assess damages for its non-performance.

This bill, filed by Rogers against Challis, prayed that an agreement, concluded by two letters of the 17th and 18th of December, 1858, might be specifically performed; “or otherwise, that such compensation or damages might be awarded to the plaintiff as this Court should deem just.”

The agreement alleged and sought to be enforced was to this effect: The defendant Challis had agreed to borrow from the plaintiff a sum of £1000, to be repaid by four equal instalments, with interest at £10 per cent, to be retained out of the sum advanced.

The security to be given was, first, a bill of sale of certain furniture, plate, linen, &c.; secondly, a bill for the first instalment; thirdly, a guarantee against the removal of the goods comprised in the bill of sale; and fourthly, by a deposit of the lease of Webb’s Hotel, Piccadilly, and of the assignment of it, which had been made to Challis.

After this contract, the defendant entered into negotiations with a Mr. Reddish, to borrow the £1000 from him on better terms.

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The defendant refused to perform his agreement with the plaintiff, who filed this bill on the 14th of January, 1859, alleging that if the contract should not be performed, he would suffer considerable damage, both by loss of interest on the money provided and set apart for the purpose of the loan, and also by reason of costs incurred in the course of the negotiations.

* On the 25th of January, and after the institution of [* 176] this suit, the defendant completed the loan from Mr. Reddish.

Mr. Follett and Mr. Hobhouse, for the plaintiff.

First, the evidence proves a distinct contract. Secondly, the contract is such as a Court of equity will specifically enforce. In *Adderley v. Dixon*, 1 Sim. & S. 607 (24 R. R. 254), specific performance was decreed, at the suit of the vendor, of a contract for the sale of debts proved under a commission of bankruptcy. Sir JOHN LEACH there explains the principle on which such relief is founded. He says: "Courts of equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a Court of equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value." And he then refers to a case of *Taylor v. Neville*, (3 Atk. 383) in which specific performance was decreed of a contract for the sale of 800 tons of iron; and to *Ball v. Coggs*, 1 Bro. P. C. 140, in which specific performance was decreed, by the House of Lords, of a contract to pay the plaintiff a certain annual sum for his life, and another sum for every hundred-weight of brass wire manufactured by the defendant during the life of the plaintiff. [The MASTER OF THE ROLLS referred to *Brough v. Oddy*, 1 Russ. & My. 55 (32 R. R. 139), in which it was held, that a Court of equity would not entertain * a bill for the specific [* 177] performance of an agreement to pay in a certain event which had happened an annual sum by quarterly instalments.] In *Bass v. Clivley*, Tamlyn, 80 (31 R. R. 71), specific performance was decreed of an agreement to lend £3000 on mortgage. Thirdly, but if the contract cannot be specifically performed, then the 21 & 22 Vict., c. 27, s. 2, enacts, that when "the Court of Chancery has

jurisdiction to entertain an application " for the specific performance of a contract, it may " award damages to the party injured, either in addition to or in substitution for such specific performance," and it then gives power to the Court to assess such damages. This is the very case which was intended to be met by this enactment; for this bill being filed on the 14th of January, 1859, the defendant completed his loan from Reddish on the 26th of the same month.

Mr. R. Palmer and Mr. Hingeston, for the defendant, were not called on.

Lord ROMILLY, M.R. :—

I am clear that the Court has no jurisdiction in this case.

I must first consider how the matter stands, independently of Sir Hugh Cairn's Act, and next, the effect of that Act. The case cannot be put higher than this: that the defendant applies to the plaintiff for the loan of £1000 upon a security which he specifies,

and the plaintiff assents to the proposal, but on the [* 178] * next day the defendant says, " I have changed my mind,

I do not require your £1000. I can get it upon better terms elsewhere." Is that a case in which a person can come to this Court for a specific performance, and say, " You, the defendant, are bound to let me advance the £1000 to you, — it is true your circumstances may be altered, but you are bound to let me advance the money to you " ? It is very justly said, that the Statute of Frauds does not apply to such a case; therefore, if the Court has jurisdiction in such a case, any conversation may be made the subject of a suit for specific performance: thus if two friends are walking together, and one says, " Will you lend me £100 at £5 per cent for a year upon good security," and the other says, " I will," that conversation might be made the subject of a suit for specific performance in this Court, if on the next day one friend should say, " I do not want the money," or the other should say, " I will not lend it." Nothing would be more difficult and more dangerous than the task which this Court would have to perform if it were to investigate cases of that description. This is not an agreement to purchase or sell anything, it is not the case of a contract to buy a particular debt upon certain terms, or a contract for the purchase of a certain quantity of goods, to be paid for by instalments and in a particular manner, in which case the Court has held, that these were circumstances which took the transac-

No. 35. — *Rogers v. Challis*, 27 Beav. 178-180.

tion out of the rule of this Court, that an ordinary contract for the sale or purchase of goods is not the proper subject of a suit for specific performance in this Court. It is nothing more than this: a proposal to borrow a certain sum of money, upon certain terms, for a certain time, which is accepted, and the borrower says two or three days afterwards, "I do not want the money, and I have got it elsewhere, upon better terms." It certainly is new to me, that this Court has ever * entertained jurisdiction [* 179] in a case where the only personal obligation created is, that one person says, if you will lend me the money I will repay it and give you good security, and the terms are settled between them. The Court has said that the reason for compelling a specific performance of a contract is because the remedy at law is inadequate or defective. But by what possibility can it be said that the remedy here is inadequate or defective? It is a simple money demand; the plaintiff says, I have sustained a pecuniary loss by my money remaining idle, and by my not getting so good an investment for it as you contracted to give me. This is a mere matter of calculation, and a jury would easily assess the amount of the damage which the plaintiff has sustained. I express no opinion whether an action would, or would not, lie in such a case as this; but I am satisfied that before Sir Hugh Cairn's Act this Court would not have entertained jurisdiction in such cases. If I recollect right, there is a case in the books (*Flint v. Brandon*, 8 Ves. 159), which decides that an agreement to fill up a gravel pit is not one of which this Court will decree the specific performance. I apprehend it would have startled some of the Judges of this Court to hear that its jurisdiction in specific performance extended to the case of agreements to lend moneys. How could it be? The case of a contract for the purchase of stock in the funds, at a particular price, is a much stronger case; for the injury arising from its non-performance might be much greater and more uncertain than in the case of an agreement to borrow a sum of money on particular terms, nevertheless specific performance in a case of stock has repeatedly been refused. It appears to me, * therefore, to be contrary to every principle on which [* 180] this Court has acted, to say, that this is a case in which, independent of Sir Hugh Cairn's Act, this Court has jurisdiction to decree a specific performance: always bearing in mind that the Court grants specific performance only in cases where the remedy

No. 36. — *Sichel v. Mosenthal*, 30 Beav. 371.

at law is inadequate and defective, and also the observations made by Lord ELDON (*White v. Damon*, 7 Ves. 35), that though the Court exercises a discretion in cases of specific performance, yet that it is to be exercised according to fixed rules and principles, and not arbitrarily.

Next, as to Sir Hugh Cairn's Act (21 & 22 Vict., c. 27). This gives the Court jurisdiction to award and assess the amount of damages in certain cases. The only one which applies to this is, where the Court has jurisdiction to entertain an application for specific performance. I am of opinion it has none here, and I think that it would be productive of very serious evil, if in cases which are the proper subjects of an action for damages, or in cases of assumpsit upon an agreement of some sort, a party could come here for a specific performance of it, or for damages; thus throwing upon a Court of equity the functions which properly belong to a jury. I think this is not the meaning of Sir Hugh Cairn's Act, and that it is not desirable to extend it to such cases.

This is a matter proper for the determination of a Court of law, the questions being, first, whether an action of assumpsit will lie upon an agreement to borrow money, and secondly, the amount of the damage which the plaintiff has sustained.

I am of opinion that the bill must be dismissed with costs.

Sichel v. Mosenthal.

30 Beavan, 371-377 (s. c. 8 Jur. (N. S.) 275).

*Agreement for Partnership with Alternative of a Loan. — Not Acted on. —
General Demurrer to Bill for Specific Performance Allowed.*

[371] The defendant agreed to enter into partnership with the plaintiffs on a future day, and on his failing to do so, to lend them £5000 for two years. He failed to do so. To a bill for specific performance of this agreement a general demurrer was allowed.

This cause came on upon demurrer. The case stated by the bill was as follows:—

The three plaintiffs carried on business in partnership as commission merchants at Manchester and Bradford. In July, 1861, the plaintiffs agreed with the defendant Mosenthal that he should join their firm as a partner therein, and accordingly, with the view of forming a new partnership between the plaintiffs and the defendant, articles of agreement were drawn up and signed by the

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plaintiffs and defendant. These articles were dated the 8th of July, 1861, and were to the following effect:—

“Agreement for partnership between Julius Mosenthal, now of Paris, late of the Cape of Good Hope, and Sichel, Alexander & Co. of Manchester and Bradford, in England, represented by Julius Sichel.

“Julius Mosenthal joins the present partners of Sichel, Alexander & Co. on the 1st of September next. The firm, from the day of Mr. Julius Mosenthal joining it, to be styled ‘Sichel, Mosenthal & Co.’ at Manchester and Bradford.

“The partnership to be for the term of five or seven years as may be decided when Mr. Mosenthal comes to Manchester.

“Proper partnership deeds to be drawn up and to provide for the following clauses: an arbitration clause; an accommodation bill clause; usual death clause; clause against any of the partners speculating in shares or pledging the firm’s credit, except for the legitimate* business of the firm; clause as to [* 372] partners’ drawings; and such other clauses as the solicitors may consider advisable.

“Julius Mosenthal to pay into the business on joining it the sum of £5000, and will cause a further sum of £10,000 to be paid in by his wife’s trustees at such dates as may be agreed upon.”

After some other provisions the articles proceeded as follows:—

“On the 1st of September of this year, the present partners of the firm of Sichel, Alexander & Co. are to be prepared and to have completed all the conditions which they have by this agreement undertaken, or should they fail in so doing, they hereby agree to pay to Julius Mosenthal the sum of fifteen hundred pounds, as computed and assessed damages, by their acceptances, half at three and half at six months from that date.

“Should, on the other hand, Julius Mosenthal fail, on that day (the first of September, 1861), to carry out his part of the agreement, he is bound, and hereby agrees to do so, to pay, on the request of Julius Sichel, to the firm of Sichel, Alexander & Co. the sum of £5000; to remain with them, as a fixed loan and credit to that firm for the space of two years, receiving from Sichel, Alexander & Co. interest at the rate of five per cent per annum, and a

commission of two and a half per cent for every twelve months, taking Sichel, Alexander & Co.'s acceptances or promissory notes for the amount."

The defendant, on account of ill health, expressed a reluctance to perform his engagement, and on the 16th of September, 1861, he had neither joined the firm nor advanced the £5000. [* 373] Applications were made to him * for the £5000, a correspondence ensued, which it is unnecessary to set out, and the firm drew on him for the amount. The bill then alleged as follows:—

"The defendant has not answered either of the last-mentioned letters, and has not accepted the draft for £5000, and he refuses to advance the £5000, and to permit the same to remain with the plaintiffs' firm as a fixed loan for the space of two years from the 1st September, 1861. The plaintiffs were fully prepared, on the 1st of September, 1861, to have completed all the conditions which they had, by the agreement of the 8th July, 1861, undertaken.

"The defendant is a man of very considerable means, and it is essential to the plaintiffs and to the success of their firm that the defendant should not withdraw from the agreement, and it is impossible to estimate, at law, the damages which the plaintiffs would incur by the defendant refusing to become a partner in their firm and to make the advance of £5000 according to the agreement."

The bill prayed as follows:—

"That the defendant may be decreed specifically to perform the agreement of the 8th of July, 1861, so far as regards the sum of £5000, the plaintiffs being willing and hereby offering to perform the same on their part.

"That the defendant may be decreed to pay to the plaintiffs, on a short day to be named by this honorable Court, the sum of £5000, and that it may be declared that the plaintiffs are entitled to retain the same for the period of two years from the time of such payment, on their paying interest for the same to the defendant at the rate of £5 per cent per annum, and a [* 374] commission * of $2\frac{1}{2}$ per cent for every twelve months, the plaintiffs being willing and hereby offering to give their acceptances or promissory notes for the amount to the defendant."

To this bill the defendant filed a general demurrer for want of equity, and on the ground that the Court had no jurisdiction.

Mr. Selwyn and Mr. F. O. Haynes, in support of the demurrer. First, the contract is too vague to be enforced. The period for which the partnership is to last is not determined, it is to be for "five or seven years, as may be decided." The partnership deed is to contain, besides the specified clauses, "such other clauses as the solicitors may consider advisable," and the wife's trustees are to pay in £10,000 "at such dates as may be agreed upon." The Court has no means of determining these matters, which are left open for subsequent arrangement between the parties themselves.

Secondly, the relief asked is a mere money demand or the enforcement of a penalty, as to which the Court has no jurisdiction. *Brough v. Oddy*, 1 Russ. & Myl. 55, 1 Tam. 215 (32 R. R. 139). It could not compel the plaintiffs to borrow the money, as was decided in *Rogers v. Challis*, 27 Beav. 175 (p. 278, *ante*); and, conversely, it could not compel the defendant to lend it. *Flight v. Bolland*, 4 Russ. 298, 301 (28 R. R. 101). This is a matter in which the remedy, if any, is at law.

Mr. W. F. Robinson in support of the bill. There is no such vagueness in this contract as to prevent its enforcement. A partnership for five or seven years is at *least good for [* 375] five, and the Court will enforce an agreement for a partnership. *England v. Curling*, 8 Beav. 129 (19 R. 6).

The "other clauses" referred to meant the usual clauses, and all this is a mere matter of conveyancing; and the stipulation as to the advance of the £10,000 is not of the essence of the contract. Even if there had originally been any vagueness, it has now been removed.

It would be impossible to estimate the damages sustained by the firm by the default of the defendant, and to avoid that difficulty, the agreement stipulates that, in lieu of damages, £5000 shall be advanced them for two years. The Court could have enforced the agreement in all its parts, and there is no reason for its refusing to enforce that which alone remains to be performed. There is a distinction between compelling one to borrow and to lend. The loss to the plaintiffs cannot be correctly estimated in damages when the calculation must proceed on conjecture: *Adderley v. Dixon*, 1 Sim. & St. 607 (24 R. R. 254); and this is the proper forum.

Lord ROMILLY, M. R. —

I am of opinion that this demurrer must be allowed. I do not think the question arises here whether this Court would specifically enforce this contract if the two last clauses had been omitted; but I entertain considerable doubts whether it would have done so.

England v. Curling, 8 Beav. 129, was a case of this description: Three persons entered into an agreement for a partnership for seven, ten, or fourteen years, and had carried it on for eleven years; one of them thought he was at liberty to [*376] turn another out; but the Court considered * that the question was, not what the terms were on which the partnership had been originally founded, but the terms by which the parties had bound themselves by acting together as partners. The case would have been very different if it had been a bill for the specific performance of an agreement for a partnership which had never been acted on.

If the plaintiffs were to say, this partnership shall last only five years, but the defendant, thinking the nature of the business to be such that it could not be worked at a profit for so short a period, insisted on the duration of the partnership being not less than seven years, which of the periods is the Court to take? It would find itself in very great difficulty on settling the articles under a decree for specific performance. Again, how would the Court deal with the clause by which the defendant says, "He will cause a further sum of £10,000 to be paid in by his wife's trustees at such dates as may be agreed upon?" What dates is the Court to insert? One side may say it shall be paid immediately, the other may say it shall be paid at the end of five years, or by annual instalments of a thousand pounds. How can the Court determine this question? and yet it would be impossible to omit this stipulation, and equally impossible for the plaintiffs to enforce the contract, without producing the £10,000, because the defendant might reasonably say, — "I entered into this agreement on the faith of your bringing this £10,000 as capital into the partnership."

Assuming the first part of the agreement could be specifically enforced, still there is this clause :— that if the defendant fails to carry out his part of the agreement he will lend the firm £5000.

He has failed to do so, and the remaining question is, [*377] whether this * clause can be enforced. The agreement is

to this effect: A. says I agree to join B. in partnership, and if I fail in that I agree to lend him £5000 at five per cent. What mutuality is there in this? The defendant might say I am ready to lend you the money at five per cent, by which I may derive considerable profit; while the plaintiffs might say, "You would not join our firm, and we will not take your money." Could the defendant file a bill to compel the plaintiffs to take the money? I am of opinion he could not; if so, this is an agreement without any consideration for it.

It is true that great loss may have been sustained by the plaintiffs by the refusal of the defendant to perform his agreement. They may have taken offices, engaged clerks, and purchased goods for carrying on the business upon the faith of the defendant's promise to join, or lend £10,000 to, them, but if so, an action at law and a jury must ascertain the amount of damage.

It would be quite new to me to hear that this Court could specifically enforce a contract to lend money, and as to compelling a person to borrow money according to his agreement, that was the point which I decided in *Rogers v. Challis*, 27 Beav. 175 (p. 278, *ante*). If this were a case for recovering liquidated damages, the plaintiffs could not come to this Court for that purpose, because they might recover the amount by an action at law. It may be true that it is not a very easy matter to ascertain the amount of damage sustained by the plaintiffs in this case, but that is the proper duty of the jury.

I approve of the mode of raising the question by demurrer, instead of allowing the case to come to a hearing, but the plaintiff fails, and I think the demurrer must be allowed on the usual terms.

ENGLISH NOTES.

The above cases establish the rule that an agreement to lend or borrow money at a future time is under no circumstances capable of being specifically enforced. The remedy is in damages, and the damages may be nominal. See *Larves v. Gurety* (1874), L. R. 5 P. C. 346; *Western Wagon Co. v. West*, 1892, 1 Ch. 271, 61 L. J. Ch. 244, 66 L. T. 402, 40 W. R. 182.

An intending mortgagee is not entitled to his costs of or incident to an agreement for a loan which is not carried out: *Melbourne v. Cottrell* (1873), 29 L. T. 293; *Holborrow v. Lloyd* (1859), 5 Jur. (N. S.) 114; unless where a mortgage of an infant's estate directed by the

Court goes off without any default of the mortgagee: see *Craggs v. Grey* (1866), 35 Beav. 166, or unless the agreement expressly provides for payment of the costs.

Where an agreement is made by the borrower to pay the lender's reasonable costs, if the loan goes off, such costs will not, in the absence of special stipulations, include banker's commission or costs of remittance, or of realising securities for the purpose of making the advance. *Re Blakesby* (1863), 32 Beav. 379. Nor will such an agreement entitle the intending lender to interest or compensation for money lying idle pending completion. *Sweetland v. Smith* (1833), 1 Cr. & M. 585.

But the Court will specifically enforce an agreement to give security for a present loan where the money is actually advanced before or at the time of the agreement: *Ex parte Jones* (1835), 4 D. & C. 750, 4 L. J. (N. S.) Bk. 59; *Ashton v. Corrigan* (1871), L. R. 13 Eq. 76, 41 L. J. Ch. 96; *Hermann v. Hodges* (1873), L. R. 16 Eq. 18, 43 L. J. Ch. 192, 21 W. R. 571, even though only part of the money is then advanced. *Hunter v. Lord Langford* (1828), 2 Moll. 272. So also where the agreement is given to secure a past debt, in consideration of forbearance. *Alliance Bank v. Broom* (1862), 2 Dr. & Sm. 289; see *Hermann v. Hodges*, *supra*.

Such an agreement, if it relates to land, is within the Statute of Frauds (29 Car. II., c. 3, s. 4), and unless accompanied by a deposit of deeds must be contained in a memorandum in writing to satisfy the Act. See *Re Beetham*, *Ex parte Brodrick* (C. A. 1887), 18 Q. B. D. 766, 56 L. J. Q. B. 635, 35 W. R. 613. An oral agreement for a security on personalty would apparently be capable of being enforced, if for an antecedent debt, or if an actual advance ensued upon the agreement.

Where an equitable charge has been already created, whether by agreement in writing or otherwise, the charge may, by verbal agreement, become a security for further advances. *Baynard v. Woolley* (1855), 20 Beav. 583, 586.

But verbal agreement that a simple contract debt shall be tacked to a legal mortgage of land is void under the Statute of Frauds. *Ex parte Hooper* (1815), 19 Ves. 477, 1 Mer. 7, 13 R. R. 244.

Where an agreement for a mortgage which is specifically enforceable stipulates that the intended mortgage shall contain usual clauses, the Court will direct the insertion of a covenant for personal payment of principal and interest: *Saunders v. Milsome* (1866), L. R. 2 Eq. 573, 14 L. T. 788, 15 W. R. 2; and of a power of sale, if and so far as not implied by the Conveyancing Act (44 & 45 Vict., c. 41, s. 19). See *Cockburn v. Edwards* (C. A. 1881), 18 Ch. D. 449, 51 L. J. Ch. 46, 45 L. T. 500, 30 W. R. 446; *Pooley's Trustees v. Whetnam* (C. A. 1886), 33 Ch. D. 111, 55 L. J. Ch. 899, 55 L. T. 333, 34 W. R. 689. If the

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agreement is under seal, the power of sale will be exercisable before the formal mortgage is executed. *Re Solomon and Meagher's Contract* (1889), 40 Ch. D. 508, 58 L. J. Ch. 339, 60 L. T. 487, 37 W. R. 331.

Where an agreement for a mortgage contains a stipulation that the principal shall not be called in for a certain time, a condition is implied that the forbearance to call in the money shall depend upon punctual payment of the interest, and, if the property is leasehold, on performance by the mortgagor of the covenants of the lease; and the Court will compel the mortgagor to execute a legal mortgage on these terms. *Seaton v. Twyford* (1870), L. R. 11 Eq. 591, 40 L. J. Ch. 122, 23 L. T. 648, 19 W. R. 200.

AMERICAN NOTES.

These cases are cited in Pomeroy on Specific Performance, p. 67, with *Conklin v. People's B. Assoc.*, 41 New Jersey Eq. 20 (citing both cases); *Bradford, &c. R. Co. v. New York, &c. R. Co.*, 123 New York, 316 (citing the *Sichel Case*). (See *ante*, vol. 6, p. 645.) These cases lay down this doctrine without discussion.

No. 37. — *EARL OF CHESTERFIELD v. JANSSEN*.

(CH. 1751.)

RULE.

EQUITY will relieve against unconscionable dealings, by way of mortgage or otherwise, with expectant heirs or reversioners.

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2 Vesey, Sen. 125-160 (s. c. 3 Atk. 301).

Unconscionable Bargain. — What is, in Equity. — Confirmation by Free Agent.

Post-obit security. Confirmation, &c. A., aged thirty, borrows [125] £5000 on bond to pay £10,000 if he survives B., aged seventy-eight. A. survives a year and eight months, having on death of B. confirmed the bargain by a new bond, &c. freely, and paying part. No relief given in this case, except as to the penalty.

The state of the case upon the pleadings and proofs, as far as was material for the consideration of the Court, was shortly this:

John Spencer in 1738, being possessed of an income of £7000

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per annum and of a personal estate in plate, jewels, and furniture, to a great value, and having contracted a debt to the amount of £20,000 to several persons, mostly tradesmen, by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of £5000 for that purpose. As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother the Duchess of Marlborough, if he survived her, he resolved to contract thereon. He was above thirty; originally of a hale constitution, but impaired: and although afterwards he lived more regular, yet he was addicted to several habits prejudicial to his health, which he could not leave off. She was seventy-eight; of a good constitution for her age, and careful of her health. He sent to market a proposal, which he supposed, would easily meet with a purchaser; as it was natural to expect in common course, that his grandmother should die first, though she was a good old life, and he but a bad young one. This proposal was, that if any one would lend him £5000, he would oblige himself

to pay £10,000 at or soon after the death of his grandmother, [126] if he survived her, but to be totally lost if she survived

him: this was rejected by several knowing persons as not sufficiently advantageous; as it was at first by the defendant; but afterward accepted by him; and a bond of £20,000 conditioned to pay £10,000 was given on those terms. She lived six years and three months; he survived her one year and eight months. Upon her death, it did not clearly appear who made the first application, whether the defendant for his money, or John Spencer for delay of payment, as he might not be able immediately to raise £10,000, although by the event he came to a great annual estate: but it was clear, that as soon as it was proposed by the defendant to John Spencer, he consented to do it; and, near two months after the contingency happened, he executed a bond in the penalty of £20,000 conditioned for the absolute payment of £10,000, at or before April following; and executed also a warrant of attorney for confessing judgment thereon; which was afterwards entered. John Spencer in 1745, at different times paid two several sums of £1000 each in part of this debt; and expressed himself several times satisfied with the conduct of the defendant; and that he should be paid his whole demand as soon as possible. The defendant after his death sued a *scire facias* against his executors for an execution; who resorted to this Court, praying an injunction, and

for relief on payment of the £5000, with interest from the time of advancing it.

For plaintiffs. This case is of great importance to the estate of Mr. Spencer, but of greater to the public. The bill is to be relieved against an exorbitant, unconscientious demand, on the known terms in a Court of equity, payment of principal really advanced and legal interest. There are three general points to be determined. First, how that contract would have stood, if properly brought in judgment in a Court of law, and considered merely upon legal principles? Next, what the fate of it ought to be in a much stronger degree in a Court of equity, when examined by principles of equity? Lastly, the subsequent transactions relied upon in the answer as a ratification of the original bargain?

As to the first, it is not good in point of law, and therefore usurious. Oppression of this kind is almost of as ancient date as the use of money as a medium of trade; and usury of a much more innocent nature was against the principles not only of the canon law, but of the common law of the land. Lord Coke says in 3 Inst. 151, that a man being found guilty of usury after his death, all his goods were forfeited to the Crown; although it is now altered by several statutes, which confine it to such a *quantum*; allowing a certain moderate profit for the use of [127] money; the difference therefore between usury and interest is in specie nothing, but in *gradu*. Though the severity of the common law is changed, the nature of things cannot be changed; it was the constitution of this country, and is so, that no gain should be exorbitant on the loan of money: and therefore it is immaterial whether it falls within the statutes or no: but this case does; where such a contract is originally for the loan of money, and exceeding the legal allowance, it is rescinded by the Act of Parliament itself, though attended in some measure with a chance; being construed a subterfuge and evasion of the Act; for if it may be extended to one life, it is difficult to tell where to stop. The Legislature took a different method formerly; in the first Acts describing minutely what species should be allowed; confining it to a direct loan of money for illegal gain, or sale of goods or merchandise to persons in necessity; the specifying whereof introduced endeavours to evade the particular kind of usury described: therefore the 21 Jac. I., c. 17, is in general terms; in consequence of which Courts of law were vested with a kind of equitable jurisdic-

tion, to consider the circumstances of the case stated as particularly as in bills in this Court. The intent of the parties at the original communication is considered even by the Courts of law as decisive; and where that is for a loan of money or colourable sale of goods, whatever is thrown in of a different kind, it is usurious, otherwise not. *Reynolds v. Clayton*, Mo. 397, and *Becher's Case* there cited. Next, wherever security is taken for a larger sum than is really advanced, it is usurious; unless the party may deliver himself therefrom by paying a less, or by doing some collateral act. The throwing something hazardous into the bargain, by which (as it is insisted) the lender might in some event have lost the whole, will not take it out of the statutes, and seems to have arisen from the statute 11 Hen. VII., c. 8, telling how far one might go to keep out of the Acts. Mo. 397, and *Button v. Downham*, Cr. El. 642; *Burton's Case*, 5 Co. Rep. 69; *Roberts v. Tremain*, Cr. J. 507; *Cottrel v. Harrington*, Brownl. 180; *Fuller's Case*, 4 Leon. 208, Noy. 151, 2 And. 15; and *Mason v. Abdy*, Carth. 67, 3 Sal. Comberh. 125. The only exception is the *fœnus nauticum*, or bottomry bonds; which for the sake of the public, and benefit of trade, are held not within the statutes of usury. The only view of the parties here was a loan of money, and security for double the sum advanced, subject to the contingency; the borrower could not deliver himself from the payment; and the Court will then lay every thing else out of the case. In the calculation of lives it is difficult to say, where the true rule is: Halley and Newton have varied: but on the first sight one would think the lender had here greatly [128] the advantage from the disproportion; so that on the face of it, it would be deemed a subterfuge in a Court of law. Suppose the bond existing; and an action brought by the defendant, after the grandmother's death; and the statute of usury pleaded; the parties may advance matters *dehors*; and it would be determined to be within the statute; which is very extensive, and, though penal, to have a liberal construction. The terms, on which men communicate to borrow and lend, cannot alter the nature of the case. The *quantum* of the risk is not material; nor did the transaction proceed on the comparison of lives: or health or constitution: but if it did, the defendant was satisfied of the contrary to what he now endeavours to support by proof, as to the constitution of Mr. Spencer.

As to the second point: Courts of equity, not being tied up to

rules, consider questions of this kind in a more extensive manner, and in general have avoided laying down any particular rule as that would (like old statutes of usury) teach persons, how far they might safely go; but declare, that wherever there is a spark of oppression, the motive on one side, necessity to apply for money; on the other, a covetous passion for undue lucre, they always relieve; not indeed setting it aside, but by giving what is really due. Their principles have been established gradually and with deliberation: and if one or two Judges, who presided here, have differed and been unwilling, they have at last been compelled by the force of precedents and the growing evil. There were many cases for relieving against unreasonable bargains in case of young heirs in the time of Lord ELLESMERE, Bacon and Coventry. The first case afterward is *Waller v. Dalt*, 1 C. C. 276, which was introductive of *Barny v. Beak*, 2 C. C. 136. In *Berny v. Pitt*, 2 Ver. 14, Lord JEFFERIES held, there was no difference, whether it was for money or wares; that the first thing prohibited by the statute is for the loan of money, and that of wares put secondarily only; and reversed Lord NOTTINGHAM's decree, who had not been long in this Court when he took that distinction. In *Berny v. Tison*, 2 Vent. 359, Lord NORTH affirmed the decree, though he showed an unwillingness, by adding *ne trahatur in exemplum*. In *Batty v. Lloyd*, 1 Ver. 141, Lord NORTH dismissed the bill. In *Nott v. Hill*, 1 Ver. 167, he would not relieve, and reversed Lord NOTTINGHAM's decree: but on a bill for specific performance of the same agreement (1 Ver. 271), he seems a little to remit that rigour he had at first, and would not countenance the practice. But *Lord Ardglass v. Muschamp*, where there was both a risk and confirmation, shows, he had entirely got the better of it from the force of precedents. Other cases were before Lord JEFFERIES, and Lords Commissioners, 1 Ver. 467, 2 Ver. 77, 78, 121, 402. So [129] *Twistleton v. Griffith*, 1 Wil. 310. In *Curwyn v. Milner*, 3 Wil. 293, Lord KING, though he seems like Lord NORTH to have brought legal notions into this Court at first, yet relieved. In *Lowley v. Hooper*, 3 Atk. 278 (19 November, 1745), an annuity of £200 was charged on the estate of an elder brother as a provision for the life of a younger, who when in distress, granted £150, part thereof, to Davenant for £1050, seven years' purchase: with a proviso that the vendor might re-purchase on notice, but there was indorsed, that it should be on paying £75 more than originally

advanced: your Lordship held it a mortgage and redeemable; and that the £75 more, when the thing was the worse for the wear, made it unfair. The principle, on which the Court has gone in these cases, is an unconscionable bargain, and it being contrary to public convenience to encourage it. Such contracts are generally founded in oppression by taking advantage of the borrower's necessity; which is the general ground of the malignancy of usury: they are of public mischief by encouraging extravagance of young men. If stopping the progress of it, as a growing evil, be thought for the public good, and no real inconvenience in laying an embargo on this sort of trade, this is *modus dignus vindice*. These contracts are generally by persons having an expectation only. Men thereby pledge their estates before they have them, consequently before they know the value. It is too true, that men generally have not so much regard to creating reversionary inconveniencies, when they consult present gratifications; know not how to estimate what they never felt the benefit of, by which their estates, like their pleasures, are gone before they enjoy them; and several poor creditors commonly fall with one of these prodigals. There is no remedy immediately by our law against this extravagance, as by the Roman law by *Curatores*, interdicting a man, not of understanding sufficient to manage his own property, from the use thereof. This extravagance has established a trade of annuities and post-obits, universally exclaimed against. The ruin of a man, who falls into this method, is declared not to be far off: he ruins his estate without spending half; for a borrower on post-obits never put it out to interest; and many of these are purchased at above half. Our sons may at this moment be doing the same; and all we have laboured for may be gone just after our death. It is on the principle of public utility that Courts of equity have gone further than the law. So from the general inconvenience, premiums for places are not allowed; because there the office falls to the man, not that he is fit for it, but the office fit for him. So in marriage brokerage bonds, the first of which was *Hall v. Potter*, it is not for the sake of the party seeking relief; or bonds to have so much a-year out of a particular office; or by clients to agents pending suit, although the party to whom it is given appears meritorious; or by a young man just after twenty-one to his guardian.

[130] In *Shepley v. Woodhouse*, 2 Atk. 535, a bond by a man and woman to intermarry in thirteen months after her father's

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death, and for a reasonable settlement; the woman above thirty, and living in her father's house; the Court went on public inconvenience, as tending to deceive and encourage disobedience to parents. The cases are not confined to young heirs; young remainder-men are as much the object: and the opinion of Lord TALBOT was, that the relief of this Court should be extended to meet such contracts; they are grown into a sort of stated traffic, which tempts young men farther than their vices. Lord KING indeed said, if this was *res nova*, he might have had some difficulty; and it may not be easy to draw the line. If a young heir wanted to portion a daughter, or a sum to put into trade, buy books, or for such occasions, equity might not interpose: but where it is to feed extravagance, the Court will stop there. The same set of men are generally employed in such contracts; and a catalogue of some of their fortunes is nothing but pieces of ruin out of several families. No proof of fraud or undue advantage is requisite: the case speaks for it: and otherwise it would be saying, the Court will not relieve at all, as to such secret transactions witnesses are not called in. It is unjust and unreasonable, and in that light a Court of equity calls it a fraud; arising from avarice on one side, and distress on the other; and will relieve on the same principles as in *Sir Thomas Meere's Case*, 1 Ver. 465. So by Lord TALBOT in *Bosanquet v. Dashwood*, Talb. 40. That it was not sought by the defendant, will make no difference; the proposal generally coming from the person in distress. The defendant could not be ignorant of it, or of Mr. Spencer's expectation and dependency on his grandmother; his own witness, Richard Backwell, saying it was hawked about, that Mr. Spencer wanted money on those terms; and the necessity of concealing it from her made him a slave to the person with whom he treated. It is literally true, that he was neither young nor an heir: but he was not old enough to manage his affairs. Twisleton was thirty-four: yet was his conduct relieved against. It is not generally in the case of heirs, though called contracts with young heirs; for an heir cannot sell a reversion: though he may estop himself by fine, he cannot grant. Mr. Spencer was *quasi heres*, expectant though not apparent: the Duchess *in loco parentis*; and his dependency on her from her constant declarations a parental dependency; and known so to be by the defendant; who on that expectation built this contract. The contract itself as well

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as witnesses prove his necessity. The bare applying to pay two for one has been held sufficient. Poor and rich are relative terms : and however large a man's estate, if he cannot pay a debt, he is literally necessitous ; and otherwise he never would have granted on post-obits, or risked his expectations on such terms. Comparing the ages, the defendant cannot be said to run any risk : and the defendant has not shown, that the contract moved on a [*131] comparison of the *health of each : nor is there any certainty in judging on these cases of lives.

As to the third point ; all the other acts of Mr. Spencer were, when under the like circumstances, as originally, proceeding from his inability to do more. His acquiescence cannot be considered a ratification, but may be excused by his looking on it as a debt of honour and a sort of wager. The bond and judgment is an evidence he could not pay ; he would go as far as possible ; no money could be raised but by annual rents, whereas an immediate payment was to be made ; and the borrower is a servant to the lender. Like *Curwyn v. Milner*, 3 P. Wms. 293, and *Wiseman v. Beak*, 2 Ver. 121, and *Lord Ardglass v. Muschamp*, where stronger instances of confirmation did not avail. So in some of the prize causes in Exchequer some repeated confirmations were held rather an aggravation. *Cole v. Martin*, 2 P. Wms. 290, differs materially from this : for there a person under no distress renounced a relief he might have had.

Although the contract is usurious in law, the proper way is to come into equity to stop this species of traffic, which is of public inconvenience ; no Act of Parliament could be made to meet this evil ; nor any rule that would not be inconvenient in particular cases. The policy of law and equity in this kingdom does nothing more than what has been done in other ages and nations : as appears from the Macedonian decree : Digest, lib. 14, tit. 6, Law 1, &c., where though the words are *filius familias*, it shall not be confined to that.

There ought therefore to be relief on payment of the real principal and interest.

For defendant. This is indeed a matter of importance ; being a question, whether a man's own act, without fraud, in full senses, and having the absolute disposal, shall bind him ? If (as has been argued) there was no other way in which the Court could assist the preservation of families from ruin, it is better the law should be

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wrong in itself, than uncertain. So far as a Court of equity can prevent such destruction by general rules, it will lay down such rules: but will not endeavour to preserve a weak or wicked man; nor say, that by the rules of equity an honest and wise man cannot be protected in his honesty and wisdom.

The question of law must arise out of the fact; the particular question of equity must depend on the fact also, considered under all its extensive circumstances, taking in the convenience and inconvenience: but still the ground to go upon must be [132] made out by evidence: it will hereby be shown, that this is a fair, honest, and honourable contract.

The circumstances come under these heads. 1st, The character, situation, and figure of life, of the obligor: 2nd, The same as to the obligee: 3rd, The motive or reasonableness thereof, inducing the obligor to solicit such a bargain: 4th, The manner of transacting and concluding: 5th, The fairness and equality of the price from the chance under all the circumstances according to the probability at the time, and the event, that has happened: 6th, The opinion the obligor always had of this.

As to the first, It is material in all cases. His understanding is not charged by the bill to be weak, or likely to be imposed on, or that he was imposed on. He was turned of thirty; no heir of any sort, in which the term is applied in these subjects; for if one, living with his father, is considered as heir, (although *nemo heres viventis*) he had no father, but was himself father of a family: he was in no state of quarrel with any relations: known never to have gamed, which, it is proved, he hated: and he had taken up some former extravagancies; and lived more temperately: was his own master; possessed of a fine family-seat, with furniture suitable to his rank and figure; of £7500 per annum for life, beside present personal estate, contingent reversions, and hopes from his grandmother. The pressure on him for his debts of £20,000 (it appears not how contracted) was from tradesmen. Justice obliged him to pay them; it would be scandalous not to do so; and prudence required it, lest it might alter his grandmother's opinion of him. He must have paid this by the annual profits, joint or single annuities for his life, or selling his personal estate, reversion, or the chance he had from his grandmother; and this would have been probably the opinion of the best and wisest friend he had. None would advise the selling his personal estate, family-pictures, &c., which would be

declaring himself bankrupt. The annual profits would not do it, nor would his creditors wait without impatience for it. As to annuities, the way taken by tenant for life who wants money for particular purposes, it certainly is not a beneficial way of contracting. It has appeared frequently that if a man sells an annuity for his own life, so that he wants to sell it, the price is above seven years' purchase, supposing him of middle age and in good health: if he was to buy an annuity for his own life, the same man gives fourteen or fifteen, and in 1743 they went so far as to give sixteen or seventeen, which is a great difference. If there is any objection to the life, they make him abate in proportion. Taking it in the common way, he could get but £7000 for £1000 per annum; taking in the objections to his life, perhaps not £5000. If he was to sell his reversion in fee or the reversion of £10,000 [133] (the interest of which he had for life) if he had no younger children, he could have sold them for little advantage: nor could he have got anything for his chance under Lord Sunderland's will. Then his only chance to raise money was this; and it was the most reasonable way, if fairly done and on reasonable terms: and otherwise his goods might be taken in execution, and sold for little value, as generally happens.

Next, for the circumstances of the defendant; who is not charged in respect of his character, behaviour, or manner of dealing; as in securities to women, their character must be charged and proved. It would have been material also that he had been acquainted with Mr. Spencer (the contrary of which is proved, as far as a negative can), or a companion in creating the debt and encouraging it. All circumstances weighing in other cases are clear of this. The defendant is not a person looking out for young men to prey upon; he did not think it a beneficial contract, and absolutely refused it; but afterward accepted it on particular application and pressing. Mr. Spencer himself, in private, fixed on what he thought the fair price, and does personally and by agents propose these terms to any who would buy; which were refused by several, only because not advantageous.

The motive has been observed on already.

As to the manner; it is proposed in the first moment as a conditional bargain. If it turned out against the defendant, there was certainty of a loss; if for him, they might live so long as that there would be a very improbable chance of gain. No undue advantage is taken; for what is proposed is simply accepted.

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As to the equality of it as a bargain of chance ; whoever deals in or buys lives must have regard particularly to the constitution of the person, manner of life, and age. If the life is bad, the company will not ensure at all : all circumstances must be considered, and it is enough to go on probable opinion. The bargain supposes an inequality in their lives, that the grandmother was most likely to die first : she was of good health, and took care of it ; Mr. Spencer the contrary, from his course of life. The insurance-offices always go on opinion, and inquire into a general account ; so that if a false account is given in, actions are frequent in Guildhall for the fraud. It is proved that, notwithstanding advice, he would not alter his course and said he did not desire to live longer than his constitution would let him. In all these chances, if a man has gone through such shocks to his constitution as he did, they deduct two years' purchase. It was the opinion at that time that he was a bad life and it appears negatively that it could not be insured at £5 per cent. Taking it on the event, she lived six years after ; he survived her but [134] twenty months. Supposing his life was insured at £5 per cent, which is the insurance in case of a person in the best health, on a computation of the value of lives and terms for years the defendant is gainer about £3000, and might absolutely have lost it if she had lived many months longer. Interest of the interest, which would then be lost, must be made in all computations. It is so as to the burdens to be borne between tenant for life and reversioner, which is rather too favourable to the tenant for life. The defendant has proved that none would give that, or so much as he did : the plaintiffs have proved nothing of that, which would have been material to show the value of the contract : the disproportion then of the risk will not make it a bad contract : nor does this court consider bargains in the nice scale of exact equality ; nor adopting the rule of the Roman law, by which, if a bargain was one half under value, it was set aside.

Lastly, his subsequent acts, as paying part, writing the letter himself to confess judgment, and taking every step after her death to carry it into execution would not perhaps be of so much weight if they were not consistent with his private opinion : his declarations in private being that he was honourably and fairly dealt by. The judgment was given freely, and not complained of afterward ; so that if it could have been set aside originally, it cannot now ;

and being in his senses, he might have released any demand. A release in terms of all his right to set it aside would have operated in point of law. Then is it not so in equity? A release indeed may, like any other contract, be set aside in this court: but that must be on new imposition in obtaining the judgment. Things did not remain in the same situation; for now the money became absolutely due; nor was he under the same necessity; and might have disputed it then. In *Cole v. Gibbons*, 3 P. Wms. 290, the contract had not a possibility of being fair; yet there was no relief, because it was confirmed with open eyes. In *Standard v. Metcalf*, November, 1734, the plaintiff lived with the defendant, her uncle, and soon after coming of age was prevailed on by him to settle her estate upon herself for life, remainder to her issue in tail, remainder to her uncle and his heirs: she afterward became a lunatic; the transaction was thought on the face of it to be hard, and an imposition by the uncle, acting as guardian, there being no consideration, nor any occasion for it, not being for marriage. On a bill to set it aside, the defendant insisted it was fair, and that after the settlement she by will, to which he was not privy, had given the estate in the same way. Lord TALBOT thought it an extraordinary contract and unfair though no proof of fraud, and said, if it depended on the settlement only he should have relieved, but the will had confirmed it, which took off that ground to set it aside: on appeal it was affirmed with this variation only, that as the bill was by the committee it ought not to bind the lunatic, but should be without prejudice to her if she should become sane and [135] seek to set it aside. The will did not operate there, but only showed a confirmation; so, but in a stronger degree, does the subsequent act here.

As to the use in fact to which this money was applied, it is not material to the defendant to show that, having advanced it *bonâ fide*: but what materially distinguishes this from other cases is, that it was applied to the payment of the borrower's tradesmen.

To consider next the question of law, — whether this contract, as it stood originally upon the bond, is void at law; if so, it is indeed putting it on a clear foundation: mankind will have a rule for their property, and know the construction of the statute; and it will be needless to argue as to the consequences in this Court, for one cannot with his eyes open make an agreement contrary to that statute. As a bargain for a contingency there

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is no objection; for all sorts of contingencies are the subject of a legal contract. Any objection then to this must be on the statutes of usury; which is not frequent in a Court of equity. No contract is a contract on usury within the statutes, which was not so before them. By the common, taken from the canon law, a notion long prevailed, that it was not lawful to take any interest for the use of money, which prevails in Roman Catholic countries to this day; and it is astonishing how they should think money might not be a commodity to be used as well as any other. This notion kept that commerce out of the world. In France they let out money to interest in another shape. Lord COKE in 3 Inst. labours hard to show that taking any interest is contrary to nature, and endeavours to prove it also contrary to the law of Moses; but the age is grown wiser, and the law is altered. Any sort of *premium* was usury; now an illegal *premium* only. *Premium* is a word more extensive than interest; and *usury* is taking a higher *premium* than the law allows for the use of money. The statute Hen. VIII. is an Act against usury, fixing the rate of it; which has been followed by the legislature until 12 Ann. and the rate of interest varied; and the sense of all the statutes may be taken together. Perhaps it may be a doubt whether it is for the public good to have any law fixing the rate of interest, or that it should be like other commodities at market; Locke's treatise upon the consideration of reduction will at least make that doubtful. But it must be taken on the statutes, which comprehend only contracts on usury. There must be a principal sum due, and a rate of hire for the use; if it exceeds the proportion fixed, the security is void; and no artificial contrivance shall evade that law: therefore on pleading the statute of usury it may be proved by any collateral evidence, where it appears not on the face of the contract. Where there is no principal and rate of forbearance, the statute relates not to it. At common law therefore, when [136] usury in general was forbid, a contract on condition or peradventure was not within it. Hawkins C. 82. never disputed as to this point; where the principal may be hazarded really, it cannot be usury. Contracts on bottomry are not excepted out of the statute; yet are clearly not within it from the nature of the contract, the contingency of the ship's returning. So the discounting notes or bills of exchange is not within the statute; no principal being due which is forborne. So the buying up of securi-

ties at a low rate on the estate of a third person, of which more than legal interest may be made, is not within the statute: so a wager at odds which is *Button v. Downham*: so of casual bargain; *Beddingfield v. Ashley*: so *Fountayne v. Grimes*, and *Long v. Wharton*. Insurance interest or no interest, is barely a wager, and not within it; according to DODDRIDGE, J., in *Roberts v. Tremain*, and *Sharply v. Hurrel*, Cr. J. 209. Yet none of these cases but may be turned into such a shift as to be brought within the statute, if that is the truth of the agreement; as in bottomry, if it be a mere evasion and no risk. Where the principal is secured, no contrivance can exceed the rate of interest; which being forbid absolutely, is forbid on contingency. The cases cited for plaintiffs prove only that where it is but a nominal risk it is a mere shift and evasion; as in Clayton's, &c. where the demurrer admitted the corrupt agreement, and there was no objection to the pleading. A stress is endeavoured to be laid on words in determining a question of property, from the word loan, &c. made use of in this case. If it is a loan within the statute of usury, it is material; but a contract on usury is not a loan in its nature; a loan being that which is gratuitous. It is true, there is a difference between a loan not consumed by using, and a loan which is consumed. The first, as of a horse, is called *commodatum*; for lending is not understood to be letting it, if not consumed: the other is to be repaid in weight and measure, and is called *mutuum*: but in its original was gratuitous. But the Court always goes to the substance. What is a loan in its nature cannot be made a purchase by calling it so: nor *e contra*. This never was proposed in the nature of usury; the original communication being for this contingent bargain: no principal was due, nor rate for forbearance; which there cannot be from the nature of the contract. In bottomry it is called a loan: but not therefore usurious: and there is no difference between this and bottomry; which is admitted to be a hazardous contract and good; not because it is for benefit of trade, but that a material risk is run, and to be paid for it. So that it turns on this, whether it is a fictitious, colourable contingency to evade the statute: for if it is so, it is void; otherwise not. If no bargain can be made of a contingency on a life, but what is within the statute of [137] usury, it will be a proposition understood by every one. Suppose an action brought, and a plea put in; this could not be considered as a nominal contingency and to evade the statute.

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Next, whether this Court can set aside this legal contract upon arguments of conscience arising out of the case, and that in the utmost latitude. The proper jurisdiction of equity is indeed to take every one's act according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules. As this is only a ground of equity, it may indeed be made out by any sort of evidence, upon all the circumstances; and on all together the Court cannot say the defendant is guilty of misbehaviour (which is not charged or suggested) or say this ought not to stand. Here is no fraud or over-reaching, no evidence from whence imposition is to be presumed; and the amount of the cases cited for plaintiffs is, that the Court will relieve against fraud in this as in other cases.

But supposing these points against the plaintiffs, another, and a very general question has been made of the first impression, viz.: supposing the transaction good in law and conscience, yet this Court should, for the sake of making a rule, set it aside on principles of policy or political reasoning; for on fraud there can be no case in which this Court will not relieve. No political principle can be stated on which it should be set aside: therefore such a ground of determination is impossible in this Court. There may be a difficulty to tell what sort of rule. It is admitted that no certain one can be drawn, because it would be dangerous, when applied to particular cases; and it is therefore said, Acts of parliament cannot be made to meet cases of this kind. This Court does not exercise or assume a legislative power, but disclaims it; and never will make a law to set aside contracts on public principles out of that cause, if good in law and conscience, let the convenience or inconvenience be what it will. The contracts in Exchange Alley were all contingencies: yet it was necessary to have an Act to set them aside, although easily proved inconvenient to the public. So of fair and equal wagers; an Act of parliament, 7 Anne, was forced to interpose. So of gaming, — money won at fair hazard, without cheating; this Court never set it aside before the legislature interposed. So that political arguments are never taken into consideration. The contracts of sailors, selling their shares before they knew what they were, could not be set aside here. It is true, there cannot be a more wretched condition than to have the rule of property uncertain: *misera servitus ubi jus vagum*. Lord DIGBY says, "Set the mark on the door of the house, and let me know

that it is wrong, or it is doing it *ex post facto*." Where the Court has gone upon public convenience, it has been in cases defined and ascertained, which, it is admitted, this cannot be. It is a misfortune, that accounts of Courts of equity are conveyed to the public in loose notes by persons not concerned in the cause, and mis-
 [138] taken, and that general rules are drawn from particular premises. The Court, in all the cases alluded to, have inferred a presumption; but in all, the presumption may be taken off: it depends on the evidence. If a trustee buys the estate himself, the evidence from his situation is sufficient; he has misbehaved; for he cannot be a check on himself, and does not act fairly, but the presumption may be taken off: as if he agrees openly and fairly with *cestui que trust*, or with the knowledge of this Court. So in bonds to lewd women, getting security for nothing; she has grossly misbehaved; and the common presumption is, that she has taken an advantage: but that may be taken off. So in marriage-brochage bonds, the defendant there has laid such a bias upon himself, that he cannot properly advise; has a power and distress over the party: this is evidence, unless taken off. So in a private bargain to give back part of the marriage portion, contrary to the public treaty, it is fraudulent, and a presumption arises of undue advantage; because the father may say he will not otherwise agree: but that may be taken off. Bargains of money, under which offices are procured from one who had the giving or recommending, have nothing to do with this: but there the presumption from the misbehaviour, as the man cannot get the office without it, may be taken off; as where sold with the King's leave; as commissions in the army; or a sum of money may be paid out of the trust of an office, as in Mr. Bellamy's case. Another instance is, the setting aside securities to attorneys pending the business; which was *Walmsley v. Booth*, 2 Atk. 27, where Japhet Crook, being prosecuted for forgery, employed the defendant to be his attorney, who was to get bail, money, and probably even evidence for him, and just then procured him to enter into a bond for £1000, for which there was no consideration but for services done: this a Court of justice would never suffer; but has relieved on principles of a general nature, that an attorney should not take advantage of his client's distress to get from him what he ought not; this Court, and a Court of law will, without showing errors, tax an attorney's bill, though settled by the party himself, unless a great acquiescence or some such

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matter: it was an unreasonable bargain; and the presumption was from his not being at liberty: but it has never been determined as a rule that a *bonâ fide* attorney may not receive a gratuity over and above, pending the matter. Another rule insisted on is, that mutual bonds to marry shall be set aside by the Court, though ever so fair: yet in *Atkins v. Farr* [Atkyn's Reports, 287], February, 1738, your Lordship decreed relief on such a bond. That rule was taken from *Woodhouse v. Shepley*; but your Lordship there said, you gave no opinion what would be the case if the bond was entered into by two persons *sui juris*, without fathers, or emancipated, having fathers. The ground there was not that the woman did not know on the bond (which she certainly did); she lived in her father's house, had nothing but from him; they met at night out of the house, and executed this bond; it was held a fraud and imposition on the father, who was made to believe the match was off: it was seducing her [139] from his house, and encouraging her in disobedience: therefore, though she knew what she did, the Court relieved. Lastly, as to the case of *post obits*: it is said, where sons, whether in remainder or otherwise, or *filius familias*, not having a fortune or emancipation of their own, are encouraged in riot and expense, the court relieves without evidence from the particular purpose, because no son in the life of his father shall make such a bargain: but that is not the ground of relief; for that may be denied like all other presumptions: from the reason of the thing it is the misbehaviour to persons under this description, to share in riot and encourage disobedience; which appears from Domat, under the general title Loan; and in another place he says that, on a bargain with *filius familias*, under such circumstances there may be relief, under such not; not saying but that a son might, for a portion, even where *filius familias*, do it. As to which an observation arises on the case determined by Lord NOTTINGHAM, who relieved against many of these contracts on particular evidence. Lord NORTH thought he went too far. Lord JEFFERIES, that he did not go far enough: which is not to be wondered at; for, judging upon circumstantial evidence, they might draw different conclusions. Lord NOTTINGHAM's reasons in his manuscript shew he did not think he was going on the general rule, that a son could not sell a contingency. The case is entitled *Berney v. Fairclough* and others, 32 C. 2. Berney was drawn into several securities for

money to be paid after his father's death, who then was infirm and kept alive by art; by some he was to pay five for one, and thus was involved in debts to 50 or £60,000, in all which he appeared to be circumvented and beset; most of the money pretended to be borrowed, being raised by delivery of wares at an excessive price, as wine, hemp, &c. which could not be sold for a quarter of the price; but the plaintiff, from his necessity (his creditors being underhand procured to fall upon him), was willing to get money on terms against which he sought relief. Lord NOTTINGHAM first made him pay the principal borrowed, before he would give an injunction; but relieved him as to the rest at the hearing; because, he said, this infamous dealing ought to be suppressed; that the Star Chamber used to punish, and this Court ought to do it; and that no family could be safe if this was suffered. But Pit prevailed; and the bill against him was dismissed, though he gained about three for one; for it was in the time of his father's health, three years before his death, without any circumvention or practice, upon an express agreement to lose the principal if the son died in his father's life; which shows the ground of the determination; relieving against those defendants guilty of misbehaviour, yet thinking that a proper bargain might be made by the heir. Lord JEFFERIES on the evidence of that case, when before him, laid a different stress, and relieved against Pit also. From that time there is no case until *Twistleton v. Griffith*, which turned on the particular fraud and circumvention. *Curwin v. [140] Milner*, as cited, is a determination against Lord KING's opinion: that he thought himself tied down by precedents, but, if it had been entire, he might have been of a different opinion: and in the note in 3 Wil. it is mis-stated, *and* instead of *or*. It is going a great way to say there can be no case where a son could sell a reversion, where the presumption is taken off. Presumption is evidence but until the contrary proved. This is not the case of a son; but of one, master of his own property. *Cujus dare, ejus disponere*. The principle is too large, that this is to be set aside because of a want of money on one side; that holding in every bargain; then as to the prospect of gain on the other, it is a laudable motive, provided they act honestly. He was under no more necessity than any man may be presumed to be, who sells his estate, and cannot therefore come into equity to set it aside, because he wanted money to pay debts, and would not otherwise have sold it.

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The ground of common recoveries is to enable people to discharge debts by sale of estates. If it is to be set aside, as being an expectation from a grandmother, the Court must go into very minute circumstances. As to the Court's relieving upon general principles against annuities for life of the seller, the Court never laid it down, that such annuities simply were paid. *Lawley v. Hooper* was on particular grounds; the plaintiff was in gaol at the time; and fraud infecting the whole: but the Court did not say, no annuity shall be allowed that a man sells for his own life; if so, there is an end of all insurances on lives. The reasoning in *Batty v. Lloyd*, 1 Ver. 151, was never contradicted. There would be great difficulty, was one not allowed to sell such things and turn into money, but must starve *ob hæredis causam*. Contracts for contingencies have been admitted; *Beckley v. Newland*, 2 Wil. 182, and in *Hobson v. Trevor*, 2 Wil. 191, a contract for sale of an expectancy was even carried into execution. In *Whitfield v. Fausset*, 1 Vol. 387, a mere possibility was sold by the heir, nothing vesting in life of the father and mother; and yet your Lordship decreed a further assurance by the heir; which, if an illegal contract, would not have been done. So where an officer, going abroad, assigned his future pay, a bill was brought to stop the money in his agent's hands: it was argued such assignments were not to be endured, because uncertain and against the public service, and should be discouraged, as spending one's estate before he has it; yet the Court thought every one might dispose of his property; and decreed it because not unconscionable, though that was a contingency and possibility; equity going further than the law, which allows as contracts, but equity as conveyances. But what is this public good, which is not to be defined? Is the end proposed by this, that none shall spend above his annual income? That is not to be secured in human nature or prevented. Though the Romans had that law, they were allowed to spend their estates. Is property to be locked up to another generation? for that effect it will have; which is contrary to the principles of the constitution of the legal part of the government; the later books for perhaps two [141] hundred years giving a reason why the statute *de donis* is not to be kept and preserved, that mankind may apply their property to pay their debts; and judges have said there is great inconvenience in people's not being able to sell their own estates. Is the end proposed, that a man may raise money on easier terms if this is set

aside? The consequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair, honest men, he will go into the hands of knaves, who will make him pay for running the risk of the law, and insist on more, when it is understood that he could not make a contingent bargain. This was not lent to feed riot, but to get rid of a pressure, which is a reasonable cause, and therefore no ground to set it aside on political motives. As the law cannot find out a general rule to proceed on, much less will this Court; and in every case where equity cannot relieve, it is not fit to be relieved.

February 4, 1750-1, the Court delivered their opinion. *Absente* WILLES, Ch. J.

BURNETT, J.:—

Upon the state of this case three points are made. 1st. That the original contract is usurious, contrary to the statutes, as being a greater premium than the law allowed; and if so, the new security will fall to the ground as well as the contract itself. Next, that if not usurious, it is so unreasonable an advantage taken of necessity and future expectancy, as the Court is warranted to relieve against as an unconscionable bargain. 3rd, That if the Court is warranted to relieve against this, the new security will be considered as a continuance of the same oppression, and stand in the same light, though entered into after the event.

The other side insist, that the original contract is a mere contingent bargain, and consequently not within either the intent or words of any statute: there are no circumstances of a destitute heir or person seduced from parental government; no practice, fraud, or surprise: and that the bargain is equal, taking into consideration the risk run of the principal; and therefore the Court is not warranted to relieve even on the foot of the original bargain. But supposing the Court would relieve on that, yet there is no precedent (but to the contrary) of relief when the party has taken on himself to be a judge of the equity of the contract, and confirms it with his eyes open.

The case is new: and I shall endeavour to throw my thoughts into one connected light, and occasionally take in all the cases cited. [142] As to the first point, whether the loan of £5000 to be paid £10,000 on the death of the Duchess if he survived her, but nothing if he died before her, is usurious, or a mere casual, contingent bargain, I hope I may be excused in calling it a loan;

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because, although in a case where the capital is not in all events to be paid the word may be improper in Courts of law, this Court at least has adopted the use of that word in respect of a mere contingent bargain, that of bottomry. If this contract be usurious, it must be either because it is contrary to express words of the statute, or an evasion out of it. It would be mis-spending the time of the Court to enter into the old notion about usury, and the condemnation of it by canonists, civilians, and some common lawyers; because all those expressions depend on a principle which is out of the present case. The common lawyers differ; there being great opinions either way. Lord COKE seems to call all usury unlawful, 2 Inst. 89, 3 Inst. 151; but in Hard. 420 Lord HALE says, the Jewish usury only is prohibited by the common law, and the true spirit of usury lies in taking an unjust and unreasonable advantage of their fellow creatures. But it must be agreed, that nothing is legally usurious that is not prohibited by the Stat. 37 Hen. VIII., c. 9, which leading statute is followed by the rest; the 12 Anne, c. 16, varying from it only in reducing the legal interest: the cases determined on the first statute have been therefore always looked on as authorities on any of the subsequent. Therefore to make a contract usurious within the express words of the statute, the reward must be taken for forbearance or giving a day of payment; and whatever shift is used, it will be usury, but not within the statute where it is otherwise. If in truth it was a sum advanced by way of loan, and the reward in truth given for forbearance, no shift will prevail. I shall better explain myself by the instances I shall put. Supposing there is a purchase of an annuity at ever such an under-price, if the bargain really was for an annuity, it cannot be usury; but if the communication was about borrowing and lending, it may be usury within the statute: and how? If by reason of all the circumstances, and of the communication, the exility of the sum given, the original contract being a borrowing and lending, the Court thinks the annuity was a mere device to pay the principal with usurious interest to evade the statute, this will be within the statute, though on the face of the bargain it appears ever so fair a sale of an annuity; the contrivance of the annuity as the usurious reward of the loan of money shall not evade the statute made for the benefit of mankind. This I take to be the sum and substance to be collected out of the several cases. Cro. E. 27; 4 Leo. 208; Noy, 151; 1

Brow. 180; and 2 Lev. 7. So a bargain on a mere contingency, where the reward is given for the risk, not for forbearance, will not be within the statute; but otherwise if the intent was to have a shift, which was Cro. E. 642, 3. If therefore a man gives or lends money, not to be paid if the event should be one way, [143] but double if the other, and it is uncertain which way it will happen, it is not within the statute: for the reward is given for the risk, not forbearance; but if under colour of such an hazardous bargain the real treaty is for a loan, with an usurious reward for that loan, and to evade the statute, the contingency inserted is of little moment, being no ingredient between the parties, the Court or a jury on the whole may pronounce such a contract usurious, notwithstanding the colour of contingency, if they are satisfied the reward is given for forbearance, not for the risk; as in the adding a single life, which is a healthy life, if that life should survive half a year, so they might as well add a contingency, if any one of six persons was alive at the end of six months; and one of the cases is, if any one of three persons is alive at that time. The intent of the bargain is the material thing: if that was borrowing the money, it is within the statute, whatever colourable contingency inserted; and this is the sense of all the resolutions in the several cases. 5 Co. 69, 70; 2 And. 15; Mo. 397; and *Mason v. Addy*. But where the principal was fairly and truly put in hazard, and such as none would run for the interest the law allows, there is no case where it has been held within the statute. The slightness or reality of the risk seems to be the only rule directing the judgment of the Court. Cro. E. 741, *Bedingfield v. Ashley*; and in 3 Keb. 304, *Long v. Wharton*, which, though inaccurately reported, seems to me good law. I cannot see two contracts bearing a greater similitude than this and bottomry. A life may be insured; so may a ship, which may sink the day after; so may the party die; one is as much an adventure as the other. It was endeavoured to distinguish bottomry from every contract upon this, that though above what the law allows upon a loan, yet bottomry contracts were established in favour of trade, there being a risk of the principal, and they being necessary for trade and commerce. But whatever favour the Court may show to such contracts, they will never establish them upon the destruction of a statute; and the principle of the Court thereon was, that the bottomry bond was not

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within the statute; nor could it be; for it is plain, that a real risk was run, that the principal may never be payable; therefore it cannot be given for forbearance, but grounded merely on the contingency, the risk. But as a colourable contingency, in case of a life annexed to the payment may make that bond usurious, so will a colourable contingency annexed to a bottomry contract: as in a bond, if one out of twenty ships, bound from Newcastle to London, arrived safe; that would be a contingency thrown in to evade the statute, which would be too hard for such a bond; so if such a contract is made, if the packet should return to Dover from Calais at a season of the year in which there is no danger: and this I may say with the more security, as *Joy v. Kent*, Hard. 418, is an express proof of it; where a bottomry bond was sent [144] to be tried, whether it was an evasion of the statute; which would not have been so, if it could not have been an evasion. Indeed Lord HALE throws out expressions very favourable to trade, but so inaccurate in that book, that I do not think they could be such as came out of the mouth of so great a man. His *dictums* then are of no authority. One of the first cases of bottomry which came in question was *Sharpley v. Hurrell*, Cr. J. 208. What the Court goes on there, is the real risk of receiving less; which is cited again in *Roberts v. Tremain*, 2 Roll. 47, and Cr. J. 508, which differed from the other. In *Soome v. Gleen*, as in 1 Sid. 27, the resolution is founded on the real hazard of the principal, which cannot be within the statute. On the whole therefore I am of opinion, that this is not a contract founded in its origin upon usury, but a contingent bargain, and consequently within the express words or intent of none of the statutes of usury.

The next point is, supposing it not a contract within the statute, whether it is not such an unconscionable bargain obtained on an expectant upon his expectancy, as the Court is warranted on precedents to relieve on paying the sum advanced with interest from the time of advancing. If it was necessary to give an opinion upon this, I own I should have great difficulty. On one hand I should apprehend it would be too large to say, in no case an heir or expectant could borrow money on his expectancy; and yet to let him borrow without any advantage to the lender seems to put him under difficulties, fathers being frequently close-handed, though liberal enough at their death: so that an heir, if hindered from supporting himself by these means, might starve

in the desert within view of the land of Canaan. On the other hand, I should dread the consequence of giving the sanction of this Court to future bargains. Lord COWPER states the inconveniencies of a sanction which had been given. I am sure, it is a point of that consequence to the welfare of mankind, that without necessity no Court will give an opinion of which an ill use may be made. For the plaintiff it is insisted, that there have been many contracts, not illegal or iniquitous in some circumstances, but from the universal ill tendency on the prejudice to the public have been always set aside in this Court, instances of which were in marriage-brochage bonds, and other contracts of like nature; and that the ill tendency of heirs contracting with strangers to furnish their wants is to make them quit a regular family life and dependency, to withdraw from advice and counsel of friends, and to have youth supplied with the means of gratifying their passions, and the bringing people together on the worst principles on which men may contract, avarice on one side, and a craving appetite on the other. The greediness of gain is the only principle on which a stranger can be induced to furnish a stranger; and the occasion of applying to a stranger is, because the wants are such as he would not reveal to his family, which tends to a delusion in what is of general concern, the provision [145] for posterity. A man may be giving his estate to a money-lender instead of the person intended; and every one disguising the truth from a man who has a right to the truth is wrong, and ought not to be encouraged; and by this delusion he gives his estate to strangers, when he thinks he is giving to his heir or relations, and when, if he had known the truth, he would have provided for that heir or relations, so as to prevent his beggaring himself. This has been a growing practice to supply young heirs; and the Court has extended its remedy. At first the cases are, where there is express proof of gross practice or actual imposition; from thence it went to cases where on the face of the contract it was so gross and unreasonable a contract between the parties, the Court, on presuming a man would not enter into it but by imposition, has relieved; of which one case among many is *Nott v. Hill*, 1 Ver. As the mischief increased, the Court has extended its remedy. Where the bargain is so lucrative, and the person under necessity, so that the judgment of the Court has been, that necessity alone could induce to make that contract,

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there has been relief; the first case of which kind is *Berny v. Pitt*, 2 C. C. 136, 2 Ver. 14, a very remarkable case, and a stronger there could not be. It is also stated by Lord Cowper in *Twistleton v. Griffith*, 1 Wil. 310, where were marks enough of imposition to warrant relieving on that foot; but he chose to establish it on the general principle and Lord JEFFERIES'S decree, not on the particular circumstances of the case; and he seems to rejoice in the consequence that this would put a difficulty on an heir to borrow on his expectancy. The last case is *Curwyn v. Milner*, 3 Wil. 293, where Lord KING decreed relief, but said, if it was new, he would not have gone so far, where such a contract was fair, and done with open eyes, saying he thought himself bound by precedents, and that he saw no difference between an estate settled on an heir on his father's death and an expectancy of personal estate at death of a relation; it is the same kind of expectancy that tempts to these kind of bargains, and the influence the same. On the other hand it is insisted, none of the particular cases cited come within the circumstances of this: that all those of fraud, practice, or imposition, are out of the case, it being a bargain sent to market by the borrower, and the terms his own: no destitute heir under parental government; having a great personal estate, and so not in the circumstances of the party seeking relief in other cases; the bargain itself different; the risk being different; and the bargain, in all its circumstances, so equitable, that if the Court should enter into a nice examination of the proportion and risk, it would appear the defendant would have been out of pocket if the grandmother had lived a little longer: that this Court will not lay down a principle in general, that an heir or expectant may not contract on his expectancy: that there have been instances, where such contracts have been carried into execution, as *Hobson v. Trevor*, and *Whitfield v. Flusset*: that it is a sufficient terror to such contractors, that they are always liable to the examination of this Court: and that they can never stand but on the reasonableness and justice of the contract, which will restrain one kind of men from preying on the [146] follies of another. These are the arguments on both sides: and there would be danger and difficulty in giving an opinion on either; but no necessity for it, that being taken away by Mr. Spencer himself, who has made himself the judge by voluntarily giving a new security.

Which is the third point, supposing the Court would relieve against this in its original, whether it will, when altered by the party in the strongest manner, not unapprised, and with his eyes open. There is no case of a contract so confirmed which was not illegal (but such as the Court would have relieved against in its original instance) where the Court has relieved against the confirmation, unless obtained by fraud or oppression, and then it has been considered as a continuance of the first oppression; of which there are two cases in Ver. *Lord Ardglass v. Muschamp* and *Wiseman v. Beake*, but no resemblance to the present from either. There was no fraud, practice, or imposition in the original contract or subsequent security: the defendant was not very pressing for his money, the security not being given until a good while after, which shows no suit or distress was threatened; but fairly and voluntarily done, and upon intimation received that the defendant had a doubt whether he could make good the contract in a Court of equity. *Cole v. Gibbon*, 3 P. Wms. 290, and the note of the case at the bottom of that, is applicable to the present.

As there is nothing therefore to set aside this contract on the foot of usury within the statutes, and next supposing it was such as would be set aside if left to the consideration of the Court, yet as the party with his eyes open has bound himself to execute it, he ought to execute it. It is too much to set it aside: the penalty therefore is the only thing which can be relieved against in this case.

Sir JOHN STRANGE, M. R.:—

There is no occasion to introduce what I have to say with making a particular state of the case; but as it depends on a variety of circumstances, many of which must be considered in the argument, I shall content myself with taking them up in the course of it.

The questions upon which I am to offer my advice are three. First, whether the original advancement of the £5000 in the manner as deposed by Mr. Backwell and disclosed in the defendant's answer, and the bond taken upon it, are to be considered as usurious, and consequently void in point of law? Secondly, whether, supposing the bond does not come within the statutes of usury, the transaction or bargain in 1733 is of such a nature as will entitle the plaintiffs to be relieved in equity on the circumstances attending that part of the case? Thirdly,

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whether what appears to have been done by Mr. Spencer after the death of the Duchess will in any and what manner influence the determination of this case.

As to the first, I concur in opinion that this is not an illegal agreement made void by the statutes of usury. The prohibition will stand on the words and meaning of 12 Anne, c. 16, for that does not materially differ from 21 Jac. I. or 12 Car. II. and appears calculated for such loans wherein two principal circumstances must concur: agreement to give and receive an allowance of profit in the mean time for the money hired in a greater proportion than allowed by the statutes; neither of which circumstances occur in the present case. The repayment of the money advanced depended on a contingency which, if it happened one way, the whole was totally lost; during the pendency of this no interest or profit could accrue to the defendant, but a mere wager or bargain upon contingency which died first: so that the whole was at hazard. It is objected, that though the letter of the contract may be so, yet if the design of the parties was to borrow £5000, and one should give a greater use for the money than the law allows, the putting it into this shape will not evade the statute, in which statute are very general words to take in all covin, shifts, &c., which I agree to; and therefore if the Court can satisfy itself that this was not in reality a bargain whereon the principal was designed to be at hazard, and the shape in which it was put was only a contrivance to evade the statute, it will be usury, and consequently void. Whether the agreement is usurious or not, may be determined two ways: 1st, By verdict of a jury on a plea of the corrupt agreement; 2dly, By the Court's exercising their own judgment on the circumstances of the case disclosed to them. The first of these methods could not be taken in this cause, because it appears the bond was cancelled upon the giving the judgment after death of the grandmother, and therefore no action could be brought on it; and if there had been a *scire facias* at law on the judgment either against John Spencer or his executors, no plea of the corrupt agreement could be received, the judgment *redditum inritum* not being a contract or assurance, which are the words of the statute; and this was the opinion of B. R. in *Foot v. Jones*, Pas. 9 G. 2; the other method has been often taken, as in *Roberts v. Tremain*, Cr. J. 508. Thus wherever the Court has seen that the contingency to put the principal in hazard is only added colourably, and only

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a nominal risk, the Court to prevent an evasion of the statute has determined it to be usury; as in *Clayton's Case*, 5 Co., Rep. [148] and other cases, where the adding the contingency of a particular person's being alive at the end of a year was only a shift. So by Holt, Comb. 125, and Carth. 68. But a wager between two to have forty for twenty, if one was alive at a future day, would not be usury. Cr. El. 642, *Button v. Downham*, and in 1 Lut. 470. Notice is taken of its appearing, that both principal and interest was at hazard. The present case is fully before the Court, and proper for the exercise of their judgment. To say it is usury, the Court must be convinced that it was the design of the defendant to make a loan of this and to secure exorbitant profit for it, and calculated as a shift to evade the statute. But I cannot think, either from the evidence or the answer of the defendant, that it was the scheme, or even in contemplation, of the party. It appears a mere wager which of the two should outlive the other. The £5000 was actually advanced, not colourably: therefore none of the cases cited prove this to be within the statutes of usury, or warrant the Court to declare it void thereon. The word "lend," on which some stress was laid, concludes nothing. Every advancement of money on bottomry is a loan, and it was properly observed to be called so in the acts of parliament; but it is the nature of the agreement and intent of the parties into which the Court must look to determine the question. Cr. El. 642 puts it entirely on the question whether it was the intent of the parties to be a wager or a loan at interest. So in Mo. 398. It has been argued, that lending money on bottomry, when more is taken than the legal interest, is grounded on the consideration of the profit to trade, and therefore it is said not to be applicable. That certainly has been one reason why so large a profit for the use of money has been allowed in that instance, but the general reason has been the not coming within the intent of the statute; for if it had, the Court could not depart from it. But the hazard the lender runs of never seeing a penny of his principal or any of the interest, takes it out thereof; and that holds as strong in the present case, and is so laid down in general where the principal and interest is in hazard. 1 Sho. 8, *Mason v. Abdy*, and in Sid. 27, a diversity is taken between a bargain and a loan. Whether a hazard or not is considered as the rule for determining whether a bargain or loan. I am of opinion there-

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fore this bond does not come within the statutes of usury, and cannot be declared void at law thereon.

On the next question, as the advice I shall offer will be grounded entirely on what was done by Mr. Spencer after the death of the Duchess, was I to suppose for argument's sake the plaintiffs were entitled to the relief prayed, I shall offer nothing as a determination of that branch of this case; though it may not be improper to throw out something in general. I see no reason to quarrel with the principal cases cited as the ground for the interposition of a Court of equity; on the contrary I cannot help declaring I concur with those determinations, and do not mean in the least to abate the force of them. In the present case there are [149] certainly many circumstances that cast a favourable light on the defendant's part of the transaction. He does not appear to be a person having an intent of fraud. The scheme moved not from him, but from Mr. Spencer, on whose own terms the money was advanced without any haggling on the part of the defendant, after it was refused by others as not a desirable contract on the calculation of chances. Not that the hands of the Court are tied up from relief from the want of fraud or imposition, — I have no jealousy of anything of that in this case, — yet cases may be wherein this Court would interpose to prevent improvident persons from spending or ruining their estates before they come to them, though no proof of actual fraud or imposition: which is agreeable to the saying of Lord JEFFERIES in *Berny v. Pitt*; when he reversed Lord NORTH's decree. So was it considered in *Twistleton v. Griffith* and in *Curwyn v. Milner*. The necessity must be seen by every wise and considerate person. The Courts keep a strict hand over these agreements, which must indeed all stand on their own particular circumstances, and perhaps it is not advisable to lay down any general rule about them, or more than is necessary to the relief in each particular case.

Therefore, without offering any advice on the bond in 1738, abstracted from the subsequent transaction, I will proceed to the third question, upon which I am of opinion, that the plaintiffs are entitled to no other relief against the bond and judgment in 1744 but as to the penalty, on payment of what remains due, and the interest from the death of the grandmother; and though I have given no opinion upon the former part of the transaction, yet I must take up this as considering the plaintiffs entitled to the relief

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prayed, as the case stood on the first agreement. And here it is not improper to take a short view of the different situation Mr. Spencer appears in 1744 from what he was in 1738. When the first bond was given, he was, notwithstanding a large income, involved in great difficulty for want of money to pay creditors, casting about every way for a present supply, and suffering dangerous schemes to be privately hawked about, fearful lest it should come to his grandmother's ears, that he was mortgaging his expectations from her. It is not very clear who took the first step toward the new engagement after death: the bond was not given until near two months afterward, though dated the next day after in order that it might carry interest from thence. But supposing the defendant had called on Mr. Spencer for his money before the 31st of October (which from his genteel behaviour in other parts I can hardly think he did), yet there is no circumstance of force on Mr. Spencer; and the security then standing

out against him was only a bond for payment of the [150] money, not a judgment on which immediate execution

could be sued; which bond would have given him time enough to turn himself about before he would be under a necessity to be exposed to an execution. It appears to be his fixed design after her death to pay off the whole as fast as he could, and that with a preference to the defendant, who, he said, had treated him like a gentleman. The defendant declared he would not press him for his money, although he should be glad to have it; and Mr. Spencer executed the bond and warrant of attorney freely and voluntarily, and well pleased therewith. It may be said, that all this proceeded from his not being apprised that there could be relief in equity against the first bond. In *Cole v. Gibbons* the bill for relief and the answer were both read to the party, and yet the assignment was confirmed; which circumstance, greatly weighing with Lord TALBOT, is not wanting in the present case: it is what the defendant himself may make use of on his part, and it will be evidence for him, viz. that he answered to the manager of Mr. Spencer, that he doubted whether the security would be good, and therefore only desired a note or memorandum; so that from this doubt of the defendant Mr. Spencer was apprised of the possibility of relief he had, if he applied to a Court of equity: which shows he acted with his eyes open in this article of confirmation; that it was not a sudden, but deliberate act, and

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agreeable to that frame of mind he continued in to his death, as appears from his subsequent letters.

Contracts of post-obits are to be discouraged; and though the relief is not granted in the present case, yet should the Court hold a strict hand over these sorts of contracts. How this would be in the case of a young heir under parental authority, I do not say. It may be improper to forejudge such a cause, but inconvenience there can be none in the determination of this. Yet in giving my opinion and advice in this very particular case against relieving the plaintiffs, I am far from blaming the plaintiffs, who are trustees for the infant, for submitting the case to the consideration of the Court, which I think very rightly done.

LEE, Chief Justice:—

The first point is, whether on the evidence before the Court relating to this transaction there is sufficient appearing to determine this contract to be usurious. As to the nature of usury, considering it at common law, or in the law of nature, or divine law, or the civil law of other countries (of which there is a large account in Pal. 291), it is unnecessary to spend time on that subject, because the idea of usury is fully settled in this country by the Legislature, which has made use of all the words the language could furnish, to prevent taking more than the legal interest, in which usury consists; and to attain this end the borrower is at liberty to disclose every circumstance in his contract, that it might [151] appear whether there was any shift, &c. It appears by 2 And. 15, and *Mason v. Abdy*, Carth., where the difference is taken and settled, that where the hazard of losing the principal is but a colourable contingency, the agreement is usurious; but where the contingency is real and forceable, it is otherwise. I think that is the material consideration, and the substantial and true reason, that bottomry-bonds are not considered as usurious on the construction of the statute itself, there not being words in the statute to reach bottomry-bonds when they run a desperate contingency of winds, seas, and enemies; the reasons touching trade not being the true reasons, although they might be inducements to Courts to construe the statutes in a favourable way. So if on advancement of money by way of loan the lender will by an agreement between the parties, in whatever manner formed, have the repayment of the principal with profit exceeding the legal interest, that will be corrupt within the statute of usury. If

therefore, two persons speaking together, one desires £100, and for the loan will give more than the law allows, and for evasion of the statute a practice is invented that the borrower shall grant to the lender £30 per annum, for so many years, this practice is within the statute, and will be usury, although the lender never has his £100 again; for by this bargain by way of loan he has full satisfaction for his £100, and more profit than the law allows; which is 1 Bul. 36, which brings the present case to the single consideration, whether the hazard the defendant ran of losing the whole principal without satisfaction for the money advanced was not a real hazard, which might require a reward beyond the legal and common interest; and where that is the case, it appears from all the authorities, that all bottoms on this in Courts of law, that it is always thought, where the profit the lender is to have is as a reward for the hazard he is subject to, and not for the forbearance of the day of payment (which are the words of the statute), they are not usurious. In *Molloy*, 314, 317, it appears these real contingencies are not within the statute of usury on this foundation.

But on the second point, I think, it will be well worth the consideration of a Court of equity, whether they will not interpose in case of these hazardous bargains to pay double, so as to prevent the lender's going away with such an exorbitant gain. It is difficult to form any general rule that can meet every case of this kind that may happen, but they must in general be governed by the circumstances in each case; only this may be always proper to be attended to, as far as may be, to bring all contracts that are in nature of loans to that mean prescribed by parliament, that none take more than the legal interest; and by the cases cited and stated in Courts of equity it appears they have used a sagacious attention to discover, whether there is any fraud expressed, or from the nature of the transaction or person concerned anything carrying on the [152] face of it an appearance of imposition; as in the case of young heirs, &c., a Court of equity has disabled them from taking advantage thereof, and interposed to prevent unconscionable bargains. That therefore is a matter worth the regard of a Court of equity so as to prevent all trade of this sort, such as is called Jewish interest, which seems a *malum* consuable at common law. What has been done by Mr. Spencer after the death of the Duchess prevents the Court from entering minutely into the considera-

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tion of the first contract; for any objections thereto are taken away by himself, in whose place the plaintiffs stand. The first contract surely might recover strength and be validated by the intervention of a new case that was fit to create a right. If he was under apprehensions of his grandmother when the first security was given, yet they were at an end at the last. If he was an infant when he gave the first bond, the contract would be voidable as to him; but if when of full age he gave a new bond, it would be good against him. In the case in Dom. 136, called the Macedonian decree, it is said, that if any creditor lent money for a just and reasonable cause, sufficient to support the equity of the obligation, it was by a favourable interpretation of the decree of the senate excepted from the general prohibition according to the quality of the use to which the money was put. The defendant has this exception in his favour, the use of his money being to pay just debts to tradesmen; for if these contracts are to be set aside upon the hatred to the creditor who has made an improper loan, yet that imputation is taken away; and even in the case of a son, if the father approves or ratifies the obligation by paying part, or the son acquits it himself, it cannot be revoked; Dom. 137, 138, in his observations upon that decree. But it is said, that though he was not under the same difficulty when he gave this new security as at the giving the first bond, yet he was a debtor then to the defendant, and liable to be called on by legal proceeding; but that cannot be a reason to set aside this deliberate act of Mr. Spencer, against whom there was then no process, but a readiness in his creditor to take paper-security instead of money, which he had a right to. I rely on 3 Wil. 291, as a stronger case than this, being a deliberate act confirming an unreasonable bargain when the party was fully informed of everything and under no surprise: that made it good. In *Cann v. Cann*, 1 Wil. 727, Lord MACCLESFIELD says, there is no colour to set aside a release which the maker had a right to make, and was not ignorant of his right; and that solemn conveyances are not slightly to be blown over.

I entirely concur therefore in opinion.

LORD CHANCELLOR (Lord HARDWICKE): —

Before I proceed to give my own opinion in this case, I must take notice, that Lord Ch. J. WILLES has signified to me his entire concurrence on these three points. Next, that the [153] great and able assistance I have had in this case has made my

task extremely easy; and as I concur in the decree I am advised to make, the great pains taken in clearing up and considering the points might have excused me from taking up any time. One thing I ought to say in the outset: that if I could have foreseen upon what particular point the judgment in this case would fundamentally turn, I should have spared the Judges the trouble of this attendance. As three points have been properly made at the bar, it is necessary to say something to each.

The first is a mere question of law upon the statutes of usury, and on the rules of law, and the same as in a Court of law, if an action had been brought on the bond, and the whole matter had been disclosed in special pleading. If I had even now a doubt concerning it, I should have held myself bound by the opinion of the Judges as a matter within their conusance, in like manner as if I had sent this to be tried at law: in which case the Court always decrees consequentially to the trial.¹ But I have no doubt about it, and concur in opinion. This question was laboured by the plaintiffs' counsel; many authorities cited; strong inferences made by them. I do not intend to go through them: but contracts on contingency are to be distinguished plainly; for a wager on chance is not within the statute, because no loan. But if there is a loan of money with an agreement to receive back more than the principal and legal interest in any event, there, though a contingency is thrown in on which the whole principal and interest may be lost by possibility, it is usurious and contrary to the statute. On this it was insisted for the plaintiffs. I will not now enter into a critical dispute, how far any such contract, where by the falling out of the contingency one way or other the money may be lost, is in strictness a loan. The civil law has very nice and refined distinctions upon this: *commodatum* & *mutuum* are there technical terms for a loan. By the first was meant where the things lent were to be restored *in specie*; by the second, where *in genere* only: but in both the things were to be restored in all events, and nothing was to be paid for the use or hire: which, when it was so, was *locatum* & *conductum* by the Roman lawyers, under which perhaps all our laws would strictly come. But these minute distinctions upon loans are not adopted by us, but we mix and confound their *commodatum* & *mutuum*; as appears in an

¹ See the distinction between the trial of an action and an issue, in *Ex parte Kensington*, Coop. Ca. Chan. 96.

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action upon a loan, which takes in both. So though interest is to be paid for it, it is with us still a loan. So though money is to be advanced upon a risk, which upon a contingency may be totally lost, it is still a loan of money; and all the books treating of bottomry call it money lent on bottomry. Besides this is plain by the express words of the Stat. 11 Hen. VII., c. 8, which shows, [154] they understood, that an adventure might be inserted in a contract of a loan; and it is observable, that this, if real and fair, exempted it from the laws of usury, though at that time all kind of usury or taking interest was unlawful. By the law of England therefore the insertion of a contingency will not of itself prevent a contract's being a loan. Consider the result of the cases cited on the statute of usury, which I will not repeat, but only deduce proper and natural inferences from them. First, if there is a loan on contingency, in consideration whereof a higher interest than the law allows is contracted for forbearance, if the risk goes only to the interest or *premium*, and not to the principal also, though real and substantial risk is inserted, it is contrary to the statute, because the money lent is not in hazard, but safe in all events; and no regard is then had whether the contingency is real or colourable; as appears from what DODDERIDGE, J., says in *Roberts v. Tremain*, who by the way takes it for granted that such a loan may be with us on contingency. Next, if the contingency extends to both, and there is a higher rate than the law allows, regard is had, whether a *bona fide* risk is created by the contingency, or whether only colourable; for if so, Courts of law hold it contrary to the statute, because it is an evasion to get out of the statute, which is prohibited by the law itself. *Clayton's Case*, 5 Co. Rep. 70, and in the case put by Popham in *Burton's Case* immediately preceding. So in *Mason v. Abdy*. But where the contingency has extended to principal and interest both, and not colourable only, but a fair and substantial risk is created of the whole, it takes it out of the statute: though called a loan, it is considered as a bargain on chance, and differs little from a wager. On this depends the case of bottomry; for I agree, that the approving thereof is from their being fair contracts on a real hazard, and not that they concern trade; though trade and commerce is taken into consideration, but not alone relied on to support usury; for that cannot be. The plaintiffs' counsel object to this by laying stress on certain expressions and *dictums* of Judges in some cases, that there must

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be no transaction or communication of borrowing and lending; and care must be taken that there be no such; and therefore as the first proposal in the present case was to borrow money on a contract to pay two for one, it is usurious notwithstanding the contingency thrown in. A very right answer has been already given; that Courts of justice are to regard the substance of things on a contract, and not mere words, which might be inaccurately used by the parties in private dealing. But another answer may be given: that in the most accurate books these expressions are applied to cases arising on purchase of an annuity or sale of goods and merchandise at a *premium* or advanced profit beyond the rate of legal interest; in which cases these expressions are properly applicable; but cannot be so to loans on contingency;

that is, a fair, real contingency; for there, from the nature of [155] the thing, the communication must be about a borrowing and lending; as is plain from the case of *Bottomry*; and the case put by *Dodderidge, J.*, in terms, is of lending £100, &c., upon a casualty; if it goes to the interest only and not the principal, it is usury; which he clears by the case of *Bottomry*. The very stating of the case on the purchase of an annuity or sale of goods proves the truth of this. An annuity may be purchased at as low a rate as you can, provided it was the original negotiation to purchase and sell an annuity: but if the treaty began about borrowing and lending, and ends in the purchase of an annuity, it is evident that it was only a method or contrivance to split the payment of the principal and usurious interest into several instalments, and consequently that it was a shift; which is *Fuller's* case, and *Tanfield's*, 4 Leon. and Noy, 151, which I take to have been on the same deed as that in 1 Brownlow. So in the sale of goods or merchandise it is lawful to sell as dear as you can, on a clear bargain by the way of sale: but if it is first proposed to borrow, and afterwards to sell goods beyond the market price, this is usurious: of which there are two cases in Mo. 397. The very putting these cases shows how proper and forcible those expressions of the judges before-mentioned are, when used in the purchase of annuity and sale of goods; but how improper when thrown out in cases of loans of money on contingency.

The second question is, supposing the first contract to be valid in law, whether it was contrary to conscience, and to be relieved against in this Court upon any head or principal of equity. I will

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follow the prudent example of not giving any direct and conclusive opinion. As it would be unnecessary, it is the safest not to do it: yet it has been made necessary to say something on it. It cannot be said that such contracts deserve to be encouraged; for they generally proceed from excessive prodigality on one hand, and extortion on the other; which are *vitia temporis*, and pernicious in their consequences; and then it is the duty of a Court, if it can, to restrain them. This Court has an undoubted jurisdiction to relieve against every species of fraud. 1. Then fraud, which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case. 2. It may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other; which are unequitable and unconscientious bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited 1 Lev. 111, *James v. Morgan*. A third kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting: and this goes farther than the rule of law; which is, that it must be proved, not presumed; but it is wisely established in [156] this Court to prevent taking surreptitious advantage of the weakness or necessity of another: which knowingly to do is equally against conscience as to take advantage of his ignorance: a person is equally unable to judge for himself in one as the other. A fourth kind of fraud may be collected or inferred in the consideration of this Court from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement. It may sound odd that an agreement may be infected by being a deceit on others not parties: but such there are, against such there has been relief. Of this kind have been marriage-brochage contracts; neither of the parties herein being deceived: but they tend necessarily to the deceit of one party to the marriage, or of the parent, or of the friend. So in a clandestine, private agreement to return part of the portion of the wife or provision stipulated for the husband to the parent or guardian. In most of these cases it is done with their eyes open, and knowing what they do: but if there is fraud therein, the Court holds it infected thereby, and relieves. So where a debtor enters into a deed of composition with his creditors

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for 10s. in the pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor, to induce him to sign this deed, that he will pay or secure a greater sum in respect of his particular debt: in this there can be no particular deceit on debtor, who is party thereto: but it tends to deceit of the other creditors who relied on an equal composition, and did it out of compassion to the debtor. (1 Wms. 768; 1 Atk. 105.) This Court therefore relieves against all such underhand bargains. So of *premiums* contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons having the legal appointment of these offices are or may be deceived thereby: or if any person, agreeing to take the *premium*, has authority to appoint the officer, it tends to public mischief by introducing an unworthy object for an unworthy consideration. These cases show what Courts of equity mean when they profess to go on reasons drawn from public utility. To weaken the force of such reasons, they have been called political arguments, and introducing politics into the decision of Courts of justice. This was showing the thing in the light which best served the argument for the defendant, but far from the true one, if the word "politics" is taken in the common acceptation: but if in its true original meaning, it comprehends everything that concerns the government of the country, of which the administration of justice makes a considerable part; and in this sense it is admitted always. To apply this: thus far, and in this sense, is relief in a Court of equity founded on public utility. Particular persons in contract shall not only transact *bonâ fide* between themselves, but shall not transact *malâ fide* in respect of other persons, who stand in such a relation to either as to be affected by the contract or the consequences of it; and as the rest of mankind beside the parties contracting are concerned, it is properly said to be governed on public utility. The last head of fraud, [157] on which there has been relief, is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, &c. against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties

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contracting: weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground on which there was relief against Pit; there being no declaration there of any circumvention, as appears from the book, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement: the father, ancestor, or relation, from whom was the expectation of the estate, has been kept in the dark; the heir or expectant has been kept from disclosing his circumstances, and resorting to them for advice, which might have tended to his relief and also reformation. This misleads the ancestor; who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons who have divided the spoil beforehand. Consider which of these species is in the present case. There is no colour of evidence of actual fraud in the defendant; who did not think he was doing any thing immoral or unjust: although if the declarations of Mr. Spencer can be believed, the defendant had a misgiving how far it could be held good in this Court. But though this case is clearer of actual fraud than almost any that has come, yet several things are insisted on for the plaintiffs, as necessity on one side and advantage taken of it on the other: unconscionableness in its nature from the terms of paying two for one in case of the death of an old woman the next week or day: that there was deceit upon her, who was *in loco parentis*, from whom were his great expectations. This was, however, the thing intended. I admit also there are more circumstances alleged on the side of the defendant to weaken and take off than have concurred in most cases of this kind. Mr. Spencer was of the age of thirty; possessed of a great estate of his own; not weak in mind, but of good sense and parts: though in that the witnesses differ. If it was necessary to give an opinion upon this point, I should consider the weight of these objections and the answers to them: but as it is not, I will only consider the contingency inserted, which was to cure the whole. I would not have it thought that the insertion of such a contingency would in every case sanctify such a bargain. Suppose such a bargain made by a son in life of his father or grandfather, on whom was his whole dependency: I appeal to every one what the consequence of it would be. Whether such a

contingency is inserted or not, it will come to the same [158] thing; the creditor knowing the fund for payment must depend on the debtor's surviving the father or grandfather, whether it is said so or not: and therefore I have always thought there was great sense in what Vernon reports to be said by the Court in *Berny v. Pitt*, "that the expressing the death of the son in life of the father makes the case worse," &c. I have not mentioned the reasons drawn from the discouragement of prodigality and preventing the ruin of families: considerations of weight; and ingredients which the Court has often very wisely taken along with them. It is said for the defendant to be vain and wild for the Court to proceed on such principles: if it had been said it was ineffectual in many instances, I should have agreed thereto; but I cannot hold that to be vain and wild which the law of all countries and all wise legislatures have endeavoured at as far as possible. The senate and law-makers in Rome were not so weak as not to know that a law to restrain prodigality, to prevent a son's running in debt in life of his father, would be vain in many cases: yet they made laws to this purpose: *viz.*, the Macedonian decree, already mentioned: happy, if they could in some degree prevent it: *est aliquod prodire tenus*. It is said for the defendant that this would be to assume a legislative authority; and that several Acts of parliament have been thought necessary to restrain and make void contracts of a pernicious tendency to the public. What can be properly called such an assuming in this Court, I utterly disclaim: but notwithstanding I shall not be afraid to exercise a jurisdiction I find established (2 Vern. 14), and shall adhere to precedents (1 Wms. 310). As far, therefore, as the Court went in *Berny v. Pitt*, in *Twistleton v. Griffith*, in *Curry v. Milner*, and the opinion of Lord TALBOT on the original transaction in *Cole v. Gibbons*, 3 P. Wms. 290, so far, and as far as these principles do naturally and justly lead, I shall not scruple to follow. The Acts of parliament instanced will be found to be made (many of them), not for want of power in this Court to give relief in many of these contracts, but to make them void in law, to give the party a short remedy against them. The judgment I am going to give will not be founded upon this: but I have done it that the work of this day may not be misunderstood, or precedents thought to shaken: not that this establishes such a contract as is called fair, like killing fairly in a duel, which the

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law does not allow as an excuse for murder. Joint annuities and *post obits* are grown into traffic; which ought to abate of its fairness.

As to the last question, of the subsequent acts of Mr. Spencer: this is the point on which the determination of this case will depend; and I entirely agree with the opinion delivered already. Had the first bond been void by the statutes of usury, no new engagement would have made it better: the original would have infected it. But if a man is fully informed and with his eyes open, he may fairly release, and come to a new agreement, and bar himself of relief which might be had in this Court. The material inquiry is, whether this was done after full information, freely, [159] without compulsion, &c.; and upon the best consideration of the evidence it appears to be so done, and with fairness. First, the condition of the necessity of Mr. Spencer was over; for though he had no power over the capital of this accession of estate, yet it was so great a one that little more than one-third of a year's income would have paid off the whole. If that then be a state of necessity, how far shall it be carried? Then, the state of expectancy was over by the death of the Duchess: and also the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her; which was the principal restraint upon him: so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement: and it appears that before this new bond he had sufficient notice that he had a chance at least that he might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good. Lastly, there was no impediment against his seeking relief by disclosing the whole case at that time in a Court of justice. Under these circumstances was the new engagement, without any fraud, contrivance, or surprise to draw him in; which operates more strongly than the deed of confirmation in *Cole v. Gibbons*, that it is too much to set it aside. The only difference to distinguish that from this case was, that there the releasor was not in the power of the releasee; here Mr. Spencer was debtor, and his creditor might immediately have distressed him by an action: but the answer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiff, that *Cole v. Gibbons* was a single case; and there are several precedents, in which such new security and sub-

sequent transaction was not sufficient to give a sanction to a demand of this kind: as in *Lord Ardglass v. Muschamp*: but the circumstances there show it not to be at all applicable: then the confirmation in *Wiseman v. Beak* was still more extraordinary; and that was a very extraordinary invention of Serjeant Philips of a bill to be foreclosed against a relief in equity. In both those cases the original transaction was grossly fraudulent: but I have only shown it here to be a doubtful object of relief in this Court: which surely is the most proper case of all others to put an end to by a new engagement.

On the whole, therefore, the only relief is that, which I am advised to give, against the penalty of the last bond.

The only doubt which could arise on this is as to costs; to which the defendant is not entitled. The plaintiffs are only executors; they had a probable cause of litigating this contract, which is far from deserving favour, and were in the right to submit it to the judgment of the Court: and it is observable that in *Cole v. Gibbons*, which was on this point, the bill was dismissed without

costs: and no costs given on the bill, but on the contrary [160] deducted. There was indeed in that case no penalty, as there is here: but still that does not take away the discretion of this Court in respect of costs according to the circumstances of the case: and there are several cases of a bond with a penalty disputed, where, though the costs at law will undoubtedly follow the demand, yet on the circumstances costs in this Court are refused.

Therefore let it be referred to the Master to take an account of the principal, and interest, due on the bonds of 1744, and the judgment thereon, and to tax the defendant his costs at law; and an account of the money paid by Mr. Spencer to the defendant; and let that first be applied to discharge the interest, and then to sink the principal; and all just allowances be made; and on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge satisfaction on the judgment: but that must be at the expense of the plaintiffs: and if the plaintiffs pay what is so found due, let there be no costs in this Court on either side: but otherwise let the bill be dismissed with costs.

ENGLISH NOTES.

The interference of Equity to give relief in the case of dealings with expectant heirs and reversioners was at first limited to *post obit* securities such as the one given by John Spencer in the above principal case. See also *Curwyn v. Milner* (1731) 3 P. Wms. 293, *n.*; *Peacock v. Evans* (1809), 16 Ves. 512, 10 R. R. 218, but the Courts extended this jurisdiction over mortgages and sales effected by expectants.

The doctrine as to expectants includes not only heirs apparent or presumptive but also all remaindermen and reversioners. *Beynon v. Cook* (1875), L. R. 10 Ch. 389, 32 L. T. 353. See also *Tottenham v. Emmett* (1865), 14 W. R. 3, 11 L. T. 404; *Earl of Aylesford v. Morris* (1873), L. R. 8 Ch. 484, 497, 42 L. J. Ch. 546, 28 L. T. 541, 21 W. R. 424. A similar principle has been applied to the case where an expectant heir under a strict entail of Scotch estates has, in ignorance of his rights, and for inadequate consideration, joined in a disentailing deed. *Menzies v. Menzies* (1893), 20 Rettie, 108.

The circumstance that the mortgagor is a young man is regarded as of importance, but the application of the doctrine is not excluded by the fact that he is of mature age, if the transaction is unconscionable. *Earl of Portmore v. Taylor* (1827), 1 Sim. 182; *Davis v. Duke of Marlborough* (1818), 3 Swanst. 139, 143. Pecuniary distress is a material, but not an essential element. *Bromley v. Smith* (1859), 26 Beav. 644; *St. Aubyn v. Harding* (1858), 27 Beav. 11; *Foster v. Roberts* (1861), 29 Beav. 467; *Emmett v. Tottenham* (1864), 10 Jur. (N. S.) 1090, 12 L. T. 838.

By the Sale of Reversions Act (31 & 32 Vict., c. 4) it is enacted (sect. 1) that no purchase made *bonâ fide* and without fraud or unfair dealing of any reversionary interest in real or personal estate, shall hereafter be opened or set aside merely on the ground of under value. The word "purchase" includes every kind of contract, conveyance or assignment under or by which any beneficial interest in any kind of property may be acquired (sect. 2).

This Act is carefully limited to purchases made *bonâ fide* and without fraud or unfair dealing, and leaves under value still a material element in cases where it is not the sole equitable ground of relief; these changes in the law have in no degree whatever altered the *onus probandi* in the cases alluded to by Lord HARDWICKE in the principal case where the circumstances or conditions of the parties raise a presumption of fraud. See per Lord CAIRNS in *Earl of Aylesford v. Morris* (1873), L. R. 8 Ch. 484, 490, 42 L. J. Ch. 546, 28 L. T. 541, 21 W. R. 424.

In cases of this nature the old rule still holds good, that the *onus*

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lies on the mortgagee to show that the terms of the transaction were under the circumstances reasonable. *Gowland v. De Faria* (1810), 17 Ves. 20, 11 R. R. 9.

After some difference of opinion it seems to be settled that where an expectant heir or reversioner deals with his interest, the fact that such dealings are known to his father or other near relatives is material as tending to rebut the presumption of fraud or extortion, but will not of itself prevent relief from being given. *Savory v. King* (1857), 5 H. L. Cas. 627; *Earl of Aylesford v. Morris*, *supra*; *O'Rorke v. Bolingbroke* (1877), 2 App. Cas. 814, 26 W. R. 239.

The fact that a person dealing with his reversionary interest had no separate and independent adviser will raise a strong suspicion of fraud if the terms of the bargain appear to be unreasonable. *Fry v. Lane* (1888), 40 Ch. D. 312, 58 L. J. Ch. 113, 60 L. T. 12, 37 W. R. 135; *James v. Kerr* (1889), 40 Ch. D. 449, 58 L. J. Ch. 355, 60 L. T. 212, 37 W. R. 279. See *O'Rorke v. Bolingbroke*, *supra*.

In granting relief to expectant heirs and reversioners from unconscionable mortgages of their interest the Court applies the principle that the conveyance is to be treated merely as a security for the money actually advanced with interest and generally costs. *Edwards v. Brown* (1845), 2 Coll. 100; *Re Slaters' Trust* (1879) 11 Ch. D. 227, 48 L. J. Ch. 473, 40 L. T. 184, 27 W. R. 448. Compound interest will not be allowed to the mortgagee, though he may have been kept for a long time out of his money. *Gowland v. De Faria* (1810), 17 Ves. 20, 11 R. R. 9. The Court may in its discretion disallow the costs of the mortgagee whose dealings with an expectant have been unconscionable. *Taylor v. Yates* (1871), L. R. 11 Eq. 265; see *Fry v. Lane* (1888), 40 Ch. D. 312, 58 L. J. Ch. 113, 60 L. T. 12, 37 W. R. 135; *James v. Kerr* (1889), 40 Ch. D. 449, 58 L. J. Ch. 355, 60 L. T. 212, 37 W. R. 279.

If an unconscionable bargain takes the form of a sale it will generally be treated as a mortgage to secure the money actually paid with interest at 5 per cent, and mortgagee's costs. *Peacock v. Evans* (1809), 16 Ves. 512, 10 R. R. 218; *Davis v. Duke of Marlborough* (1818), 2 Swanst. 139, *n.*; *Douglas v. Culverwell* (1862), 4 De G. F. & J. 20, 6 L. T. (N. S.) 272, 10 W. R. 327. And a grantee from an expectant who denies the grantor's right to redeem on these terms, and refuses tender of what he is entitled to receive, is liable to be ordered to pay the costs of the suit. *Tottenham v. Emmett* (1865), 11 L. T. (N. S.), 404, 12 L. T. (N. S.), 838. In cases of gross fraud and misrepresentation on the part of the grantee, the transaction may be avoided altogether, so as not even to be available as a security. *Kay v. Smith* (1856), 21 Beav. 522, 7 H. L. Cas. 750.

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An expectant heir or reversioner may lose his right to relief in respect of an unconscionable mortgage of his interest: —

(1) If after coming into possession he formally confirms and ratifies the transaction: *Cole v. Gibbons* (1734), 3 P. Wms. 289; *Stump v. Gaby* (1852), 2 De G. M. & G. 623; especially if he has then independent advice. See *Lyddon v. Moss* (1859), 4 De G. & J. 104, 5 Jur. (N. S.), 637.

(2) If he does or concurs in anything which puts it out of his power to restore the consideration with interest and costs. See *King v. Hamlet* (1834), 3 Cl. & Fin. 218; *Savory v. King* (1857), 5 H. L. Cas. 627.

(3) If he lies by and acquiesces in the transaction for a considerable lapse of time. *Sibbering v. Earl of Balcarras* (1850), 3 De G. & S. 735; *Turner v. Collins* (1871), L. R. 7 Ch. 329, 41 L. J. Ch. 558, 25 L. T. 779, 20 W. R. 305.

But in order that the ratification or acquiescence may be effectual to bar the mortgagor's right to relief, he must have ceased to be under the pressure or influence which forced or induced him to enter into the original transaction. *Gowland v. De Faria* (1810), 17 Ves. 20, 11 R. R. 9; *Curwyn v. Milner* (1731), 3 P. Wms. 293. n.; *Kendall v. Beckett* (1830), 2 Russ. & My. 88; *Kempson v. Ashbee* (1874), L. R. 10 Ch. 15, 44 L. J. Ch. 195, 31 L. T. 525, 23 W. R. 38.

AMERICAN NOTES.

This case is repeatedly cited in Pomeroy's Eq. Jur., and in an admirable discussion of a *post obit* transaction, by PARSONS, C. J., in *Boynton v. Hubbard*, 7 Mass. 112. Mr. Pomeroy doubts that the English doctrine would prevail here in the absence of *actual* fraud. He says: "The English policy of protecting ancestral estates has never prevailed in this country."

An expectation or hope of succeeding to an ancestor's property is not a right that may be released. *Needles' Exr. v. Needles*, 7 Ohio St. 432; 70 Am. Dec. 85.

The principal doctrine is found in *Jenkins v. Pye*, 12 Peters (U. S. Sup. Ct.), 257; *Martin v. Marlow*, 65 North Carolina, 695; *Bacon v. Bonham*, 33 New Jersey Equity, 614; *Parsons v. Ely*, 45 Illinois, 232; *Buller v. Duncan*, 47 Michigan, 94; 41 Am. Rep. 711 (a very striking case of relief of a young spendthrift, trading on his expectations).

But equity upholds such agreements or assignments, fairly made, when they have ripened into reality. *Field v. Mayor, &c.*, 6 New York, 179; 57 Am. Dec. 435; *Curtis v. Curtis*, 40 Maine, 24; 63 Am. Dec. 651; *Trull v. Eastman*, 3 Metcalf (Mass.), 121; 37 Am. Dec. 126 and notes, 128.

No. 38. — **Baker v. Bradley**, 7 De G. M. & G. 597. — Rule.

No. 38. — **BAKER v. BRADLEY.**

(L.J.J. 1855.)

RULE.

EQUITY will relieve against a mortgage given for inadequate consideration to or for the benefit of a person who is in a fiduciary relation toward the borrower, or has exercised over him undue influence or pressure.

Baker v. Bradley.

7 De G. M. & G. 597-627 (S. C. 2 Jur. (N. S.) 98).

Mortgage. — Inadequate Consideration. — Fiduciary Relation. — Undue Influence.

[597] Property was devised in trust for the testator's daughter and her assigns for her life, and to permit her to receive the income for her life for her separate use, with a direction that her receipts alone, or of some person or persons authorised by her to receive any payment of the income, after such payment should have become due, should, alone, notwithstanding her marriage, be good discharges. *Held*, that she was restrained from anticipation.

Transactions between parent and child, if in the nature of a settlement of property or rights, are regarded with favour, and not with minute regard to the consideration; but if in the nature of bounty from the child soon after he attains majority, are to be viewed with jealousy, and as the subject of interposition of the Court to guard against undue influence.

A mortgage was made of property by a father and son, immediately after the latter had attained his majority, to secure debts due from the father, to some extent incurred in improvements on the property and in maintaining and educating the son. The mother joined in the security, for the purpose of subjecting it to her separate estate, which she was, however, by a clause not recited or noticed in the mortgage, restrained from anticipating. The son had no separate advice on the occasion. *Held*, that the mortgage was not capable of being supported as a family arrangement, but was void as obtained by undue influence.

This was the appeal of the plaintiff from the dismissal with costs of the bill by Vice-Chancellor STUART. The case is reported below in the 2nd volume of Messrs. Smale & Giffard's Reports, 531, where the facts are fully stated. The following sum-

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many of them is transferred to this place from the judgment of Lord Justice TURNER.

The bill was filed by William Baylis Baker for the purpose of having a mortgage, dated the 2nd of September, 1848, to the Defendant J. Bradley, for securing the sum of £1300 and interest, and another mortgage of the same date to John Lovegrove (now vested in the defendants Thomas Cuff Adams, Joseph Lovegrove and William Cother, his representatives) for securing the sum of £500 and interest, declared to be absolutely void as against him, and delivered up to be cancelled, and for the purpose of having it further declared that * another mortgage, dated [* 598] the 28th of October, 1850, to the defendant Joseph Lovegrove, for securing the sum of £700 and interest, ought to stand as a security against him for so much only of the £700 as was due from him to the defendant Joseph Lovegrove at the date of that mortgage.

Charles Baker and Ann his wife, the father and mother of the plaintiff, were also made defendants to the suit.

William Baylis by his will dated the 25th day of August, 1835, gave certain messuages and hereditaments of which he was seised to Thomas Clutterbuck Croome, as follows: "To hold the same to the said Thomas Clutterbuck Croome, his heirs and assigns for ever, to the use of and in trust for my said daughter Ann Baker and her assigns for and during the term of her natural life, and to permit and suffer her to receive the rents and income to arise therefrom during the term of her natural life separate and apart from her present or any future husband, and not subject to his debts, engagements or control; and I declare that the receipts of my said daughter Ann Baker alone, or of some person or persons authorized by her to receive any payment of the said rents and income, after such payment shall have become due, notwithstanding her said present or any future marriage, shall alone be good discharges for the said rents and income, or for so much thereof as shall be thereby acknowledged to have been received. And from and immediately after the determination of the estate hereinbefore limited to the use of and in trust for the said Ann Baker for her life as aforesaid, then to the said Thomas Clutterbuck Croome and his heirs during the natural life of my said daughter, in trust to support the contingent uses and estates hereinafter limited, yet to permit and suffer * the [* 599]

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said Ann Baker to receive and take the rents and income to arise from the said hereditaments during the term of her natural life as aforesaid, and from and immediately after the decease of the said Ann Baker, then to the use of and in trust for the said Charles Baker, if he shall survive the said Ann Baker, for and during the term of his natural life, to enable him to support himself and to support and bring up the children of the said Ann Baker; and in case the said Charles Baker should die in the lifetime of the said Ann Baker, and if she should marry any future husband who should happen to survive her, then to the use of and in trust for any future husband of the said Ann Baker who may happen to survive her, for and during the term of his natural life; and from and immediately after the decease of the survivor of them the said Ann Baker and the said Charles Baker, and of any future husband of the said Ann Baker, if such future husband shall survive her, then to the use of all and every or any one or more of the children, grandchildren or other issue of the said Ann Baker by the said Charles Baker, or by any future husband (such grandchildren, issue to be born before any appointment shall be made to them respectively) in such manner and form, and, if more than one, in such parts, shares and proportions, and with such limitations over, or substitutions in favour of any one of the others of the said children, grandchildren and issue respectively, and at such time or times, age or ages, day or days, and in such contingencies, and under and subject to such directions and regulations for maintenance, education and advancement, and to such conditions as the said Ann Baker, notwithstanding her present or any future husband, at any time or times and from time to time by any deed or deeds to be signed, sealed and delivered by her in the presence of two or more credible witnesses, to [* 600] be with or without power of revocation and new * appointment, or by her last will and testament in writing or any writing in the nature of a last will and testament, or any codicil or codicils to be respectively signed and published by her in the presence of and attested by three or more credible witnesses, shall direct, limit or appoint, or give and devise the same; and from and until default of and from time to time, and subject to such direction, limitation and appointment, gift or devise, then to the use of and in trust for the child of the said Ann Baker, if only one, whether male or female, and for all the children of the said

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Ann Baker, both male and female, if more than one, and whether by her present or any future husband, to be equally divided between or among them, share and share alike as tenants in common and not as joint tenants, and the heirs of the body and several and respective bodies of the same children respectively lawfully issuing, with cross remainders in tail between and among such children of the said Ann Baker; and in default of such issue, then to the same uses, upon the same trusts, and for the same estates as are hereinafter devised to the said Thomas Clutterbuck Croome, to the use of and in trust for my daughter Mary Baylis and her children, and the issue of such children; and in default of issue of all the children of the said Ann Baker and of the said Mary Baylis, then to the use of and in trust for the said Ann Baker, her heirs and assigns absolutely." The testator then devised other estates to his daughter Mary Baylis upon similar trusts, and in default of children of the said Mary Baylis, then on the same trusts in favour of Ann Baker and her children, and failing children of Ann Baker, to Mary Baylis absolutely. He appointed Ann Baker and Mary Baylis executrixes of his will.

The testator died soon after the date of his will. The plaintiff William B. Baker was the only child of the *tes- [* 601] tator's daughter, the defendant Ann, the wife of the defendant C. Baker. He was an infant at the time of the testator's death, and attained twenty-one on the 25th of May, 1848. His mother, the defendant Ann Baker, was at this time about fifty-three years of age; and his aunt, Mary Baylis, who had been married to Mr. Holder, was then a widow without children, and about forty-six years old.

During the minority of the plaintiff the defendants C. Baker and Ann his wife borrowed the sum of £1000 of the defendant J. Bradley, and the sum of £500 of John Lovegrove, a solicitor at Gloucester, upon mortgages of Mr. and Mrs. Baker's life interests in the estates devised by the will of William Baylis (the defendant Ann Baker conveying her life estate as if she was not restricted from anticipating) and the recitals of the will of William Baylis contained in the mortgages not referring to the receipt clause following the limitations to the separate use of the defendant Ann Baker and Mary Baylis.

It appeared, however, probable, that these recitals might have been copied from a previous mortgage of the life interests to a

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person of the name of Carter, which was transferred to the defendant Bradley, and which had been settled by another solicitor, a Mr. Clutterbuck, who had acted for all parties in that transaction, there being the same omission in the recitals contained in this previous mortgage.

Part of the sum of £1000 secured by Bradley's mortgage was (together with a further sum of £100 advanced by him to the defendant Baker) further secured by an assignment of the defendant Baker's furniture, and both the sums of £1000 and £500 were also secured by policies of insurance upon Baker's life.

[* 602] * From the evidence in the cause, it appeared that, even at this early period of the mortgage to Bradley, which was in the year 1844, the defendant C. Baker suggested to the defendant Bradley that his policy might be dropped in case the plaintiff, upon attaining twenty-one, would charge the £1000 upon his interest in the estates, and that the defendant Bradley agreed to the suggestion.

John Lovegrove died in the month of March, 1848, and it appeared that both shortly before and after his death, and before the plaintiff attained twenty-one, the defendant Joseph Lovegrove (who was a solicitor and one of the executors of John Lovegrove) on behalf of himself and his co-executors, and of the defendant Bradley, entered into communication with the defendant C. Baker upon the subject of the plaintiff's charging the mortgage moneys due to Bradley and John Lovegrove's estate on his interest in the mortgaged premises. There did not appear, however, to have been any direct communication between the plaintiff and Lovegrove until the 30th of May, 1848, five days after the plaintiff had attained twenty-one.

On that day the plaintiff went with the defendant C. Baker, his father, with whom he was then living, to the office of Joseph Lovegrove, and there signed a memorandum, which recited that the plaintiff, under the will of the testator, after the decease of his mother and any husband she might leave surviving, subject to a power of appointment, was entitled to certain hereditaments therein comprised, and also to those devised to the said Mary Baylis. The memorandum also recited the indenture of the 28th of November, 1842, Lovegrove's mortgage, and also the indenture of the 11th of May, 1844, and Bradley's deed. It recited the loan of [* 603] £1000 upon the bill of * sale, and that £500 was now

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due to the executors of Lovegrove and £1,100 to Bradley, and that a large proportion of the above sums had been applied by the father and mother of the plaintiff in his maintenance, education and advancement in life, as he did thereby admit and acknowledge. The memorandum then proceeds as follows: "Now he the said William Baylis Baker doth hereby undertake, promise and agree to and with the said T. C. Adams, Joseph Lovegrove and William Cother the younger, and the said J. Bradley respectively, that he the said W. B. Baker will, whenever thereunto requested by them the said T. C. Adams, J. Lovegrove and W. Cother the younger, and J. Bradley, or any or either of them, at his own costs and charges, make, do, execute and perfect all such acts, deeds and assurances as may be deemed necessary for securing to them respectively, all their respective executors, administrators and assigns, the repayment of the said several principal sums so respectively due as aforesaid, together with all interest now or hereafter to become due upon the same sums respectively, and for such purpose to convey and assure to them respectively, and to their respective heirs, executors, administrators and assigns, all his estate and interest whatsoever under the said will, and under any demise, limitation or appointment which has already been made or may hereafter be made by his said mother under or by virtue of the power or authority to her for that purpose given in and by the said will, and also all the estate and interest which he the said W. B. Baker may hereafter become entitled to under the said will by reason of survivorship or otherwise, the said T. C. Adams, J. Lovegrove and W. Cother the younger, and the said J. Bradley, to take as to priority according to the dates of their several mortgages; and the said W. B. Baker doth hereby further undertake, promise and agree that, in case the said T. C. Adams, J. Lovegrove and W. Cother the * younger, and the said [*604] J. Bradley, should desire it, he the said W. B. Baker will, at his own costs and charges, and as soon as may be, raise, borrow or make, do and execute all necessary acts, deeds and assurances for the purpose of raising or borrowing upon security of the hereditaments and premises aforesaid such sum or sums of money as shall be requisite and necessary for paying to the said T. C. Adams, J. Lovegrove, W. Cother the younger and J. Bradley respectively all principal and interest

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moneys which may be due to them respectively on the before-mentioned securities.

“Dated this 30th day of May, 1848.

“Witness,

“W. B. BAKER.

“J. LOVEGROVE.”

After the plaintiff had signed this memorandum, application was made to the defendant Bradley to advance the further sum of £200, which he agreed to do, and a deed of appointment by the plaintiff's mother, in his favour, of the fee of the estates and two of the mortgage deeds, in question, viz., those of the 2nd of September, 1848, were prepared. On the 24th of August, 1848, the engrossments of these deeds were read over to the plaintiff and his father at the office of Mr. Joseph Lovegrove. But it appeared that the plaintiff had no other adviser, and it was not even alleged that any advice was given to him as to any claims which his father had upon him, and no suggestion was made to him that his mother's life estate was subject to any restriction against anticipation; the case of the defendants being, that up to this time, at least, it was not supposed by any of the parties that the will operated any such restriction.

On the 1st and 2nd of September, 1848, the above-mentioned deed of appointment and the mortgage deeds were executed, and the £200 was advanced by Bradley. [*605] *The mortgage deeds were both dated the 2nd of September, 1848. One was made between Charles Baker and Ann his wife of the first part, the plaintiff of the second part, and John Bradley of the third part. It recited the will and the memorandum of the 30th of May, 1848, the plaintiff admitting that the sum of £1000 was then due to Bradley, and £500 to the executors of John Lovegrove, from Charles Baker and Ann his wife, together with a further sum of £100 lent by J. Bradley to Charles Baker. By the first witnessing part of the deed (in consideration of £200 paid by Bradley to Charles Baker and to the plaintiff) Charles Baker covenanted for the repayment of the same, and also that the estate of himself and his wife under the will should be charged therewith. By a further witnessing part it was expressed that, in pursuance of the agreement and in consideration of the premises, the plaintiff thereby granted, conveyed, assigned, and confirmed unto Bradley, his heirs and assigns, all and singular the estates

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devised under the testator's will, including those firstly given to Ann Baker, and those secondly given to Mary Baylis, and all the estates and interest of the plaintiff comprised in the deed of appointment of the 1st of September, 1848, as a security for the sums of £1000, £100, and £200, making together £1300. The deed contained a covenant on the part of the plaintiff to pay the above sums and interest, and a power of sale. The other mortgage deed of even date was executed by Mr. and Mrs. Baker and the plaintiff in favour of the executors of Joseph Lovegrove to secure £500.

The receipt clause by Mrs. Baker was omitted in the recitals of both the mortgage deeds.

The policies of insurance for securing the mortgage moneys were then allowed to drop. The plaintiff *after- [* 606] wards, in the month of November, 1848, borrowed of a lady of the name of Mary Taylor a further sum of £300 upon mortgage of his reversionary interest, and this mortgage was approved by a separate solicitor on the part of the plaintiff. It was dated the 4th of November, 1848.

Some time after the date of this transaction, and in the month of December, 1849, the defendant Joseph Lovegrove applied to Croome, the devisee under the will who had possession of the title-deeds of the estates, for the delivery of them to the mortgagees, and in consequence of this application counsel was consulted on the will and advised that the life interest of Mary Baker was subject to a restriction against anticipation. The fact of counsel having thus advised appeared upon the evidence to have become known to the plaintiff in the month of June, 1850.

In consequence of this opinion of counsel, the delivery of the deeds by Croome was not further pressed. Pending and subsequent to the application for the deeds, the plaintiff attempted to raise further moneys upon the security of his reversionary interest, through the medium of another solicitor, Mr. Howard, and ultimately of Mr. Lovegrove, but these attempts failed. It appeared that the plaintiff had at this time a copy of the will in his possession.

The plaintiff having failed in his attempt to raise further moneys, he and his father borrowed small sums from time to time of the defendant Joseph Lovegrove, some of which appeared to have been advanced to the father at the instigation of the plaintiff. Ultimately, having become embarrassed in their affairs, the plaintiff

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and his father applied to the defendant Lovegrove for an advance of £700 to extricate them from their difficulties, and he [* 607] *agreed to make the advance upon the security of a mortgage, and upon the assurance of the plaintiff and his father that no advantage should be taken of the supposed defect pointed out by the opinion of counsel arising from the provision against anticipation. A mortgage, dated the 28th of October, 1850, was thereupon prepared and executed.

At the time of the execution of this mortgage it had not been ascertained what payments were to be made on account of the plaintiff and his father, and the account as to the application of the £700 was not therefore then settled. It was afterwards, in the month of December, 1850, settled between the plaintiff's father and the defendant Lovegrove, and the balance paid to the plaintiff's father. The account was subsequently sent to the plaintiff and acknowledged by him to be correct, with the exception of a very small item.

Subsequently to these transactions, and in the month of June, 1851, a portion of the furniture which had been assigned to the defendant Bradley was sold with his consent, and the proceeds, amounting to £108 15s. 6d., were paid to the plaintiff's father, who thereupon gave to the defendant Bradley a substituted security by a deed dated the 21st of June, 1851.

The plaintiff also after these transactions attempted, through a Mr. Lediard, to raise money to pay off the existing mortgages, and some letters appeared to have been written by Mr. Lediard with reference to such proposed payment, but the attempt to raise the money ultimately failed in consequence of the difficulty arising upon the provisions of the will as to the alienability of the mother's estate. Application was also made by the plaintiff [* 608] and his father to the defendant Bradley in the * summer or autumn of 1851, to reduce the interest of his mortgage.

On the 18th of May, 1852, the plaintiff filed his bill in the present suit, alleging that in the abstracts of the will of William Baylis, made with a view to the deeds of September, 1848, the proviso against anticipation by the said Ann Baker, as well as the similar proviso against anticipation by Mary Baylis, were entirely omitted, and that there was nothing on the face of such abstract to cause any suspicion that the original will of the said William Baylis did in fact contain any such proviso against anticipation,

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or that Ann Baker was in any way restrained and prevented from executing valid and effectual charges upon her life estate under the said will. The bill stated that the "plaintiff was advised that such omission was a fraud upon the plaintiff, and that by reason of the youth and inexperience and want of legal advice, and also of the parental control exercised over him, with the full knowledge and concurrence of the defendants, and also by reason of such fraud, the two indentures of the 2nd of September, 1848, ought to be declared null and void, and decreed to be delivered up to be cancelled, so far as the plaintiff might be affected thereby." But the bill did not set out the agreement of May 30th, 1848.

The Vice-Chancellor held that the agreement was good as a family arrangement, and that the omission in the recitals in the securities of the clause in the will was immaterial, as that clause did not, in his Honour's opinion, operate as a restraint upon anticipation. His Honour doubted the correctness of the report of *Field v. Evans*, 15 Sim. 375.

Mr. Elmsley and Mr. Hoare for the appellant.

* Mr. Elderton for Mr. and Mrs. Baker. [* 609]

Mr. Wigram and Mr. Selwyn for the defendant Bradley.

Mr. Malins and Mr. Forster for the defendant Lovegrove.

Mr. Bacon and Mr. Rogers for the other defendants.

The arguments were similar to those adduced below, which will be found fully reported in Messrs. Smale & Giffard's Reports.

The following authorities were referred to:—

On the question of the effect of the restraint upon anticipation, *Acton v. White*, 1 Sim. & St. 429 (24 R. R. 203); *Barrymore v. Ellis*, 8 Sim. 1; *Medley v. Horton*, 14 Sim. 222; *Field v. Evans*, 15 Sim. 375; *Brown v. Bamford*, 1 Phil. 620; *Re Ross's Trust*, 1 Sim. (N. S.) 196.

* On the question of parental influence and family [* 610] arrangement, *Hatch v. Hatch*, 9 Ves. 292 (7 R. R. 195); *Huguenin v. Baseley*, 14 Ves. 273; *Wood v. Downes*, 18 Ves. 120 (11 R. R. 160); *Carpenter v. Heriot*, 1 Eden, 338; *Tweddell v. Tweddell*, Turn. & R. 1; *Archer v. Hudson*, 7 Beav. 551; *Thorner v. Sheard*, 12 Beav. 589; *Hoghton v. Hoghton*, 15 Beav. 278; *Bellamy v. Sabine*, 2 Ph. 425; *Wallace v. Wallace*, 2 Dr. & War. 452; *Kennedy v. Green*, 3 Myl. & K. 699; *Maitland v. Irving*, 15 Sim. 437; *Maitland v. Backhouse*, 16 Sim. 58; *Hewitt v. Loosemore*, 9 Hare, 449; *Wright v. Vanderplank*, 1 Jur. (N. S.) 932.

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On the question of pleading, *Especy v. Lake*, 10 Hare, 260; *Ferraby v. Hobson*, 2 Ph. 255; *Maguire v. O'Reilly*, 3 Jo. & Lat. 240; *Glascock v. Lang*, 2 Ph. 310; *Knight v. Majoribanks*, 2 Mac. & G. 10; *Price v. Berrington*, 3 Mac. & G. 486; *Wilde v. Gibson*, 1 H. L. Ca. 605.

Judgment reserved.

The Lord Justice KNIGHT BRUCE:—

The bill in this case I understand to have been filed in the month of May, 1852; the plaintiff, who attained his majority on the 24th or 25th of May, 1848, having soon afterwards in that year, and in the year 1850, signed an agreement and executed certain deeds, which, by way of suretyship for his father, professed to make, and (if equitably as well as legally valid) made the person and * property of the plaintiff liable for certain debts of his father (one of the defendants).

The main question in the cause is whether, so far, these instruments bind the plaintiff legally and equitably, or are in equity void against him; a question in considering which it was right to endeavour to form an opinion as to the true construction of the will of his maternal grandfather, Mr. Baylis, with respect to the life interest of the plaintiff's mother in the property in which her life interest and his interest by way of remainder under the will were, by the instruments that I have mentioned, professed to be charged.

For if the life interest of the plaintiff's mother under the will was alienable by her during her coverture, it is obvious, when we look at what had occurred before 1848, that her position, and that of her family, so far as liable to be affected by hers, were very different in and after April and May, 1848, from what a contrary state of things known to exist would have rendered them; and this independently of the consideration not unimportant that her life interest if alienable was made liable to exonerate the plaintiff and his property partially at least from the debts of her involved and embarrassed husband; but, if otherwise, of course not. And it is undisputed and unquestionable on the evidence, that the plaintiff became a party to each of the instruments of 1848, in the belief that her life interest under the will was alienable by her during her coverture; and therefore, that she and her property and family were affected accordingly.

Having attentively considered Mr. Baylis's will, the view that I

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take of it is, that, as to the life interest which it gave to Mrs. Baker, the plaintiff's mother, it restrained her from anticipation during her coverture. These words, * "And I declare that [* 612] the receipts of my said daughter Ann Baker alone, or of some person or persons authorised by her to receive any payment of the said rents and income after such payment shall have become due, shall alone, notwithstanding her said present or any future marriage, be good discharges for the said rent and income, or for so much thereof as shall be thereby acknowledged to have been received," seem to me, with the context, to have that effect; and this I should have thought even if the case of *Field v. Evans* had never been decided.

But I may observe, that the report of Mr. Simons, and the Registrar's Court Book of the day on which it was determined, seem to me to justify a belief that both the VICE-CHANCELLOR of England and Mr. Simons saw the original or a copy of the instrument there in question, and I am disposed to think the report correct and trustworthy rather than otherwise, which I say not without having read the petition in that case; it was produced to us on the 25th of July last, I believe, with the Court Book, by Mr. Latham.

So reading the will of Mr. Baylis, I consider it to be established, that to the instruments of 1848 the plaintiff became a party under a misapprehension, material and important in its nature, because in the belief that I have mentioned. The same view of the will — the view, that is, which I have said that I think erroneous — was perhaps taken, and perhaps honestly taken, in 1848 by some or all of the other parties to those instruments respectively. But the defendant Mr. Joseph Lovegrove, the mortgagee of 1850, and one of the mortgagees of 1848, is a solicitor, and was in that character professionally concerned for the other mortgagees in the transaction of 1848. Nor can any one of the parties to this suit, I conceive, deny * that in and before September, [* 613] 1848, they all had at least constructive notice of the whole contents of the will. But the plaintiff, who, if in any part of the transactions of 1848 and 1850 he had any solicitor or adviser, had not any other than Mr. Joseph Lovegrove, and was not before the year 1850 apprised that the restraint on alienation existed, or might be reasonably contended to exist according to the correct construction of the will, was in 1848 caused or

allowed to sign and execute the instruments of that year, under the impression, the erroneous impression, I repeat, as it appears to me, which I have mentioned.

There are, however, other circumstances damaging to the instruments, so far as they purport to make the plaintiff a surety. The deeds proceed on the notion of the clear validity of the appointment of the 1st of September, 1848, made by Mrs. Baker in the plaintiff's favour, an appointment which, if its validity or invalidity could and ought to be determined on the materials before the Court in the present suit, must, in my opinion, be deemed bad and worthless; for its motive and object seem to me to have been to make the inheritance of the property comprised in it subservient to the purposes of the father and his creditors in a transaction in which the mother and the son seem merely to have been used as the father's instruments under the guidance of Mr. Joseph Lovegrove, the lawyer of the father's creditors.

Now, the power under which the appointment was made extends to grandchildren, and, if it has not been well exercised, may be exercised perhaps hereafter so as to exclude the plaintiff. Again, the almost indescribable document of the 30th of May, 1848, prepared and attested by Mr. Lovegrove in that month, [* 614] was gravely *treated in the following September as if it had bound the plaintiff, or been anything more than waste paper as against him and his property.

He executed the deeds of September, 1848, under the false impression that the instrument of May was effectual against him, and I am not sure that any one of the parties to the eccentric arrangement of that year was in that year of a different opinion. But it seems impossible to suppose that Mr. Joseph Lovegrove could have believed in the truth of the strange suggestion, that the father had a demand on the son or his property for his maintenance, education, and advancement, nor of course is there or was there any pretence for saying that the father's expenditure on the property (however beneficial to it) created any demand between them. Assuredly neither the father nor Mr. Joseph Lovegrove ought to have endeavoured to induce the plaintiff to sign or execute, or ought indeed to have abstained from recommending him not to sign or execute, any one of the deeds of 1848. Of course the astonishing agreement of May is not a matter to be dealt with except as a thing prejudicing the case of the mortgagees

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of 1848, from whom it seems to me to take away such chance, if any, as they might otherwise have had, of retaining the plaintiff or his property in the position of surety for his father.

Upon the whole, if not independently of that agreement, yet certainly that agreement being taken into account, the plaintiff has, in my opinion, with respect to the disputed mortgage deeds of 1848, established a case, on his part, of misapprehension, imprudence, inexperience, unadvisedness, ignorance, and subjection to unduly exercised influence, in all which Mr. Joseph Lovegrove's participation, and to all which his privity, must prevent the other mortgagees from effectually contending that *they [* 615] were not throughout apprised of the true circumstances:

a case, I say, sufficient on these grounds, in my opinion, to render it incumbent on a Court of equity to relieve the plaintiff and his property from all the obligations of suretyship for his father which were with such a remarkable want of propriety imposed on the plaintiff in 1848.

The same observations apply with equal force, or not importantly less strongly, to the security for £700 of October, 1850. It was the duty of the defendant, Mr. Lovegrove, who at least after 1848, if not in and after 1848, had been acting as solicitor for the plaintiff, not to take that security from the plaintiff without affording him more information and better advice than he had, and so far as it affects him or his property by way of suretyship for his father, it cannot, in my judgment, be allowed to stand. It is true that Mr. Rolt's opinion upon the construction of Mr. Baylis's will was known to the plaintiff before July, 1850, and therefore before he gave the defendant, Mr. Lovegrove, the security of October, 1850, for £700; but the defendant Mr. Lovegrove, who made the plaintiff's mother a party to the security, and in the transaction treated her as not restrained from anticipation, cannot, in my opinion, support it against the plaintiff, on the ground that he then had notice either that she was so restrained or that the point was doubtful.

It was suggested in the argument that the transaction of 1848, impeached by the bill, might be supported against the plaintiff as amounting to a family arrangement. Now if, in the French language, he were described as having been well arranged in those operations, I should probably not dissent from the phrase, but I cannot agree that according to the sense ascribed by English

[* 616] Courts of equity to the term “family * arrangement,” or, that according to *Pullen v. Ready*, 2 Atk. 557; *Gordon v. Gordon*, 3 Swanst. 400 (19 R. R. 230); *Tweddell v. Tweddell*, Turn. & R. 1 23 R. R. 168); or any of the authorities cited in *Palmer v. Wheeler*, 2 Ball & B. 18 (12 R. R. 60), and *Harvey v. Cooke*, 4 Russ. 34; and in Mr. Swanston’s notes to *Davis v. Uphill*, 1 Swanst. 136, and *Dunnage v. White*, 1 Swanst. 137 (18 R. R. 33), there was in the present instance, in 1848, a family arrangement, or an arrangement binding on the plaintiff, a witless lad, who in those transactions appears to me to have been a mere prey ensnared and plundered by hands from which he ought to have received guidance and protection.

It has, however, been contended on the part of some at least of the defendants that the bill contains at once too much and not enough, and omits to state or proceed on the only case, if any, capable of saving it from dismissal. To this, however, I cannot agree. True, the agreement of May, 1848, is, I believe, not mentioned in the bill, which contains broad and heavy imputations of fraud: but Mr. Bradley and Mr. Lovegrove rely in their answers upon the agreement, it forms part of the evidence, and there are facts stated by the bill sufficient, in my judgment, upon the pleadings and the evidence as they stand, to entitle the plaintiff to the decree to which I have alluded, and which will be more particularly mentioned. The bill, however, not drawn by any counsel now in the cause, is so long, and is otherwise framed in a manner so far from commendable, that originally I thought its contents sufficient to deprive the plaintiff wholly of his costs, at least from the commencement of the suit to the hearing of the appeal, and at one

time, accordingly, I considered that there should to the [* 617] * present time be no costs given against any of the parties.

But my impression now, as between the plaintiff and the defendant Mr. Lovegrove and the defendant Mr. Baker, is not so. My conclusion, after full consideration, being that the public interest equally and private justice require that the two latter should be charged in favour even of this plaintiff with his costs to this time, but by reason of the state of the pleadings to a limited amount only, that amount to be now fixed.

It was also contended for the defendants, the mortgagees, that the plaintiff, by confirmation or acquiescence, or both, has precluded himself from any title to relief if otherwise he could have had any: and that relief ought to be given to him, if at all,

only on the condition of making good the life policies of insurance that were previously to the year 1851 allowed to drop or become extinct, on the faith, it was said, of the securities of 1848. But, subject only to what I shall say, there has, I think, been neither confirmation nor acquiescence on the part of the plaintiff, whom I cannot, upon the evidence, consider as having been before May, or June, 1850, made aware that his mother's restraint from anticipation existed, or that the question of its presence or absence was doubtful or arguable, nor do I think that he ever intended to relinquish or concede his right, if any, to relief against the securities which he had given.

Each of the policies was abandoned before April, 1850, and Mr. Rolt's opinion not having been given until May, 1850, the abandonment of the policies does not, I think, form any ground of complaint or of total or partial defence against the plaintiff, or for imposing any condition upon him. The plaintiff had a right to make * the mortgage to Miss Taylor, whatever his [* 618] position as to the earlier securities, without mentioning which it would have been very improper for him to give a security to Miss Taylor; and, subject to the qualification that I shall state, not any act or conduct of the plaintiff, subsequent to the time when he became first apprised of his true position and the real state of things, has occasioned any loss or damage or inconvenience to the defendants, or to any one or more of them. It is, however, true that in the year 1851 the plaintiff, then aware of Mr. Rolt's opinion, seems to have aided his father in obtaining Mr. Bradley's assent to the arrangements which, mentioned in the deed of June, 1851, were completed by that instrument. It seems to me, therefore, that it is right to require the plaintiff, as a condition of obtaining relief in this suit, to make good to Mr. Bradley the net produce of the sale of the effects sold, as in the deed stated, at least in the sense that I shall mention.

The result appears to me to be, that we should discharge the order dismissing the bill, that the plaintiff should submit to be bound by such order touching redemption or foreclosure as the Court may make, and should submit to pay to the defendant Mr. Bradley the sum of £108 15s. 6d. as part of the £1300 in the pleadings mentioned, together with such interest as may be due to Mr. Bradley on so much of the £1300: that the plaintiff should pay to Mr. Bradley the £108 15s. 6d. on or before the

20th of February next, and that an account should be taken of what is due to Mr. Bradley for interest on so much of the £1300: that we should continue the injunction until further order, and declare the several instruments of mortgage or security of September, 1848, and October, 1850, void in equity against the plaintiff, save as concerning the indenture of the 2nd [* 619] * of September, 1848, to which the defendant Bradley is a party, so far, if at all, as that indenture is a security to the defendant Bradley for such, if any, part of the £1300 as was *bona fide* advanced to and received by the plaintiff, and save as concerning the indenture of October, 1850, so far as that indenture is a security to the defendant Mr. Lovegrove, for so much of the sum of £700 mentioned in it as, independently of that indenture, formed a *bona fide* debt from the plaintiff to the defendant Mr. Lovegrove, or was advanced by him upon the plaintiff's express request: that there should be an inquiry whether any and what part of the £1300 was *bona fide* advanced to and received by the plaintiff, and when and under what circumstances, and an account of what, if anything, is due to the defendant Bradley for principal and interest in respect of such part of the £1300 after giving credit in the account for the £108 15s. 6d. and interest, with which the plaintiff must submit to be charged as already mentioned; and an inquiry, also, and an account of what sum or sums was or were at the date of the indenture of October, 1850, or when the plaintiff executed it, justly due from the plaintiff to the defendant Mr. Lovegrove, either for money advanced by him to the defendant C. Baker at the plaintiff's express request or otherwise; and what, if anything, is now due from him to the defendant Lovegrove for principal and interest in respect of such sum or sums.

And I think that, in making this inquiry and taking this account, the indenture of October, 1850, ought not to be allowed to be used as evidence. But, though I have been thus dealing with some matters of detail, I am of opinion, as I believe my learned

Brother to be, that the Bar ought to have an opportunity [* 620] of addressing the * Court, upon this or a future day, on the minutes of our order, if it shall be desired.

The Lord Justice TURNER, after stating the facts as above set out, said:—

Upon these facts, which are mainly, if not wholly, taken from the statements of the defendants themselves, two questions appear

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to me to arise; first, whether the mortgages of September, 1848, and October, 1850, were originally valid in equity as against the plaintiff? Secondly, if they were originally invalid against him, has there been any such confirmation or acquiescence on his part as precludes his title to relief?

In considering the first of these questions it is, I think, necessary in the first place to inquire what was the nature and character of the transactions out of which these mortgages arose, for upon the answer to that inquiry it must, as I apprehend, depend what are the principles which ought to be applied to the determination of the case.

Transactions between parent and child may proceed upon arrangements between them for the settlement of property, or of their rights in property in which they are interested. In such cases this Court regards the transactions with favour. It does not minutely weigh the considerations on one side or the other. Even ignorance of rights, if equal on both sides, may not avail to impeach the transaction.

On the other hand, the transaction may be one of bounty from the child to the parent, soon after the child has attained twenty-one. In such cases this Court views the transaction with jealousy, and anxiously interposes * its protection to guard [* 621] the child from the exercise of parental influence.

What, then, was the true character of the deeds of the 2nd of September, 1848? The VICE-CHANCELLOR seems to have considered them as in the nature of a family arrangement, but with great respect to his Honour's judgment I cannot so regard them. They were, as I view them, deeds contrived for the purpose of charging the debts of the father upon the estate of the son, and unless the alleged outlay by the father upon the property, or his expenditure in the maintenance and education of his son, could be made the ground of claim by the father against the son, there was not, so far as I can see, any subject of bargain between them. It would, I think, be attended with the greatest danger to permit claims of this description to be made the subject of bargain between parent and child, or to treat arrangements founded on such claims as entitled to the same favourable consideration as the Court extends to family arrangements. I am not prepared to go that length. I think these deeds can be looked at in no other light than as deeds of gift from the plaintiff to his father.

Were they, then, originally valid if viewed in that light? The plaintiff attained twenty-one on the 25th of May, 1848. On the 30th of that month he signs the undertaking which I have read. It is true that some material interval elapses before the deeds are executed, but during that interval he is fettered by the undertaking. He has no independent advice. The father's solicitor, and the father's solicitor alone, acts in the transaction. If the case had even rested here, I think it would have been sufficiently difficult to maintain these deeds, but there are considerations of still greater importance affecting their validity. They [* 622] proceed upon the assumption * that the plaintiff's mother had the power of alienating her life interest, and if she had that power, her interest was by the deeds made liable for the sums secured, and would, as between the plaintiff and his mother, have been bound to contribute, if not have been primarily liable, for the payment of the sums secured. It is not even pretended that the plaintiff was advised upon this question. On the contrary, the case of the defendants is, that up to this period it was assumed by all parties that the life estate of the mother was alienable.

The case perhaps might well be disposed of upon the single ground that the alienability of the life estate, upon the faith of which the plaintiff executed these deeds, was open to doubt, and that the plaintiff was not duly advised upon that doubt; but the question of the alienability of the life estate has been fully argued before us, and I shall not therefore hesitate to give my opinion upon it. I concur with my learned Brother in opinion that, upon the true construction of this will, the plaintiff's mother was restrained from anticipation. That question is, as I view it, purely one of intention, and if the intention be manifested by the will, it matters not, in my judgment, whether it appears upon the receipt clause or upon any other part of the instrument.

A feme covert, having a life interest in property for her separate use, is indeed in the eye of this Court regarded as a feme sole in respect of that property, but there is this peculiar incident to her estate, that her interest in it may be modified and controlled by apt words used for that purpose. Notwithstanding what is said by Lord COTTENHAM in *Scott v. Davies*, 4 Myl. & Cr. 87, I have not succeeded in finding any case in which it has been [* 623] * held that any set form of words is required to effect this

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modification: and if not, I see nothing except the intention upon which the question whether it has been effected or not can depend.

It was strongly and ably argued for the defendants, that to hold the life estate in this case to be inalienable would be to act in opposition to the great majority of the decided cases upon the point; and the case of *Acton v. White*, 1 Sim. & St. 429 (24 R. R. 203), was very much relied on for this position, but that case proceeded on this ground, that the words which were used were construed to have been used only for the purpose of better excluding the marital right—the same ground, it may be observed, as was referred to by Lord ELDON in *Parkes v. White*, 11 Ves. 209. Whether this ground of decision has been sufficiently attended to in the other cases upon this point it is unnecessary now to decide; but having looked with some care into the cases upon this subject, it seems to me to be the true ground on which these cases ought to be decided, and that the question to be considered is, whether the words used are used, as Lord ELDON has expressed it, for the purpose only of unfolding what is impleid in the gift to the separate use, or for the more extended purpose of modifying and controlling the gift. In this case the words used are—[His Lordship read them]. These words seem to me to import something more than the mere unfolding what is implied in the separate use. Some effect must be given to the words “after such payment shall have become due,” but to hold them to be merely descriptive of an incident to the estate would be to give them no effect. If the testator’s purpose had been merely to define an incident to the estate, the preceding words, “and I declare, &c.,” would alone have been sufficient for the purpose.

* It was argued on the part of the defendants, that these [* 624] restrictive words had reference to the agent to be appointed, and not to the receipt; but this argument, if maintainable upon the letter, cannot certainly be supported upon the spirit of the will. Much reliance was also placed by the defendants upon the use of the words assigns in the early part of the disposition, but these words would have their operation in the event of the lady becoming discover, and it is of course the duty of the Court to put such a construction upon the will as will render it consistent in all its parts. If authority be wanting in support of the construction which we have put upon this will, the case of *Field v. Evans*, 15 Sim. 375, supplies that authority.

Upon the whole, looking to the age and position of this plaintiff when the deeds of September, 1848, were executed, to the undertaking of the 30th of May, which, though not alleged by the bill, is in evidence before us and cannot be disregarded as part of the case, to the want of legal advice, to the doubt upon the construction of the will, and to the construction itself, I am of opinion that, without reference to any question of confirmation, the deeds of the 2nd of September, 1848, cannot be maintained. An additional sum of £200, however, was advanced by the defendant Bradley upon the mortgage of this date in his favour, being executed, and it does not appear that the plaintiff did not receive some part of this sum. He cannot of course get back his estate without refunding what, if anything, he so received. There must be an inquiry, therefore, upon this point if the defendants desire it.

We come then to the question as to the original validity [* 625] of the deed of the 24th of October, 1850. This deed is not disputed by the plaintiff as to so much of the £700 as was due from him to the defendant Joseph Lovegrove. The question is, whether it can be maintained against the plaintiff as to so much of the £700 as was due from his father. This is a transaction, not between father and son, but between solicitor and client. The deed is prepared by Mr. Joseph Lovegrove. The plaintiff had no independent advice upon it. His estate is made liable for the debt due to Mr. Lovegrove from the father. The undertaking of the 30th of May is, as I collect from the answer, recited in the deed. No advice is given as to that instrument, or the nature of the claims on which it is founded. A strong case would, I think, be required to support such a deed, even if there was nothing more to impeach it. But by this deed the mother's estate also purports to be conveyed as a security for the debt, and we are of opinion that the deed was inoperative as to her. It is true that the plaintiff must be taken to have been at this time aware that counsel had advised that the mother was restricted from alienation, but how can this deed be considered otherwise than as a representation by Mr. Lovegrove that, notwithstanding that opinion, the mother's estate could be bound. That representation proves to be unfounded; and under such circumstances and between such parties, I think that, apart from any question of confirmation, this deed cannot be supported beyond the extent to which the plaintiff has submitted to be bound by it, and any

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further advances which may have been made to the father upon the plaintiff's request.

There remains then the question of confirmation only. As to this part of the case, I think it immaterial to refer to any act relied on by the defendants anterior to June, 1850, for up to that time the plaintiff was in ignorance of * his true [* 626] position. The facts on which the defendants have relied since the month of June, 1850, are these:—The transaction with Bradley in the month of June, 1851; the plaintiff's attempt to raise further moneys; the correspondence which passed in the course of that attempt, and the application to the defendant Bradley to reduce his interest. With respect to the transaction with Bradley in June, 1851, the defendants relied, not upon the instrument which was then executed, for the plaintiff was not a party to that instrument, but upon a passage in the answer of the defendant Bradley. [His Lordship read the passage, which stated that, on the occasion of the defendant giving up part of the furniture comprised in his security, the plaintiff's father, in the presence and hearing and with the sanction and acquiescence of the plaintiff, assured the defendant of the sufficiency of the defendant's mortgage securities.] It is to be observed, however, that what is here stated occurred in the course of a transaction between the father and Bradley, which was afterwards carried into effect by the deed of the 21st of June, 1851, and to which the plaintiff was a party; that the transaction did not directly relate to the estate in which the plaintiff was interested; and that the statement goes no further than that the plaintiff stood * by and heard his father make the representations in question. It is to be observed also that the plaintiff had at this time no legal adviser, and under these circumstances I think it would be going too far to hold that what passed on this occasion amounts to such a case of confirmation or acquiescence as ought to preclude the plaintiff from relief. I think that full justice will be done to the defendant Bradley in this respect by holding the plaintiff liable to make good to him the amount produced by the sale of the furniture. As to the other portions of this branch of the argument, I think it unnecessary to say more than that, in my opinion, they are wholly insufficient to preclude * the plaintiff from relief. The case [* 627] of *Honner v. Morton*, 3 Russ. 65 (27 R. R. 15), may be usefully referred to upon this point of the case.

It was endeavored to defeat the plaintiff's case upon the ground that the bill alleges a case of fraud, and that the fraud alleged is not proved. But this bill does not rest on the alleged case of fraud only. It alleges other equities on which the plaintiff has made out his title to relief, and in such cases I apprehend that the right to relief is not destroyed by the allegations of fraud, but the Court deals with those allegations in disposing of the costs.

ENGLISH NOTES.

Equity will relieve against unconscionable mortgages on the ground of fraud, pressure, or undue influence not only in favour of expectant heirs and reversioners, but generally, where mortgages are given for no consideration or inadequate consideration to or for the benefit of persons standing in a fiduciary relation to the mortgagor. In such cases, the mortgages will be treated as securities only for so much money as is proved to have been actually advanced, with interest at a reasonable rate, and, generally but not always, costs.

Where a lender by gross misrepresentation induces a poor and ignorant borrower to give a mortgage on exorbitant and unreasonable terms, the security is liable to be set aside even though no fiduciary relation exists between the parties. *Moorhouse v. Wolfe* (1882), 46 L. T. 374. See *Longmate v. Ledger* (1860), 2 Giff. 157. The rule stands on a general principle applying to all the variety of relations by which dominion may be exercised by one person over another: per WRIGHT, J., in *Morley v. Loughnan* 1893. 1 Ch. 736, 752, 62 L. J. Ch. 515, 68 L. T. 619.

Securities given by one person in favour, or at the instigation of another, have been set aside on the ground of undue influence, where the relations between the parties were those of child and parent: *Baker v. Bradley*, *supra*; *Carpenter v. Heriot* (1759), 1 Eden. 338; ward and guardian: *Montesquieu v. Sandys* (1811), 18 Ves. 313, 11 R. R. 197; *Maitland v. Irving* (1846), 15 Sim. 437; *Archer v. Hudson* (1843), 7 Beav. 551; patient and medical attendant: *Dent v. Bennett* (1838), 4 My. & Cr. 262; *cf. Blackie v. Clarke* (1852), 15 Beav. 595; and client and solicitor: *Walmesley v. Booth* (1741), 2 Atk. 27; also where one party had obtained a spiritual ascendancy over another: *Norton v. Kelly* (1764), 2 Eden. 286; *Nottage v. Prince* (1860), 2 Giff. 246. The principle applies to a person standing *in loco parentis* to another: *Archer v. Hudson* (1843), 7 Beav. 551; *Espey v. Lake* (1852), 10 Hare, 260; and to persons acting as guardians, though not legally such: *Griffin v. De Fenille* (1781), 3 P. Wms. 130 n.; *Hylton v. Hylton*

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(1754), 2 Ves. Sen. 547; see *Huguenin v. Baseley* (1807), 14 Ves. 273, 283, 9 R. R. 148, 276.

Where a fiduciary relation is proved to have existed between the parties, its continuance at the time of the transaction will be presumed in the absence of evidence to the contrary: see *Rhodes v. Bate* (1866), L. R. 1 Ch. 252, 35 L. J. Ch. 267, 13 L. T. 778, 14 W. R. 292; and even if the fiduciary relation is proved to have ceased, it does not follow that it will be deemed that the influence arising from the relation has also ceased. *Hylton v. Hylton* (1754), 2 Ves. Sen. 547; *Maitland v. Irving* (1846), 15 Sim. 437. In all such cases the onus lies on the mortgagee to show that the mortgagor was independently advised, and was fully informed as to the nature and effect of the transaction: *Baker v. Bradley*, *supra*; but see *Bainbrigge v. Browne* (1881), 18 Ch. D. 188, 50 L. J. Ch. 522, 44 L. T. 705, 29 W. R. 782; *Mitchell v. Homfray* (C. A. 1881), 8 Q. B. D. 587, 50 L. J. Q. B. 460, 45 L. T. 694, 29 W. R. 558.

Independently of statute a mortgage could not be given by a client to his solicitor for costs not actually due, or a sum by way of remuneration for services actually rendered. *Williams v. Pigott* (1822), Jac. 598; *Re Moss* (1853), 17 Beav. 346; *Cheslyn v. Dalby* (1836), 2 Y. & C. Ex. 170. But by the Statutes 33 Vict., c. 28, s. 16, and 44 & 45 Vict., c. 44, s. 5, a solicitor may take security from his client for future costs to be ascertained by taxation or otherwise; and by virtue of the Statute 58 & 59 Vict., c. 25, the costs so secured may include profit costs.

A solicitor taking a security from his client must show that he has taken no advantage of the fiduciary relation subsisting between them, and that he has given to his client full information and advice such as a client would have received if dealing with a stranger. There must be no unusual provisions in the security to the prejudice of the client. *Cockburn v. Edwards* (C. A. 1881), 18 Ch. D. 449, 51 L. J. Ch. 46, 45 L. T. 500, 30 W. R. 446.

Although acquiescence by the client may deprive him of the right to relief which he might have had if he had acted more promptly, yet an improper security obtained by the solicitor may be set aside after many years if the relation of the parties still continued: *Gresley v. Mauseley* (1859), 4 De G. & J. 78; or if the facts have been concealed or misrepresented: *Charter v. Trevelyan* (1844), 11 Cl. & Fin. 714.

A purchase by a solicitor from a client obtained by undue influence will be treated as merely a security for the amount paid with interest and costs in the discretion of the Court. *Cane v. Allen* (1814), 2 Dow. 289; *Holman v. Loynes* (1854), 4 De G. M. & G. 270.

After the relation of solicitor and client has entirely ceased a solicitor

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may deal with his former client on the same footing as with any other person. *Boswell v. Cooks* (1883), 23 Ch. D. 302, 52 L. J. Ch. 465, 48 L. T. 929, 39 W. R. 540.

AMERICAN NOTES.

This case is cited (as *Baker v. Bradley*) in 2 Pomeroy's Eq. Jur., sect. 962. See *Wood v. Rabe*, 96 New York, 414; 48 Am. Rep. 640; *Noble's Adm'r v. Moses*, 81 Alabama, 530; 60 Am. Dec. 175, citing the principal case. See notes, *ante*, vol. 6, p. 876; *Fisher v. Bishop*, 108 New York, 252 Am. St. Rep. 357; *Bailey v. Woodbury*, 50 Vermont, 166; *Miskey's Appeal*, 107 Penn. St. 611; *Williams v. Williams*, 63 Maryland, 371; *Ashton v. Thompson*, 32 Minnesota, 25; *Pusey v. Gardner*, 21 West Virginia, 469; *Kelley v. Caplice*, 23 Kansas, 474; 33 Am. Rep. 179; *Villa v. Rodriguez*, 12 Wallace (U. S. Sup. Ct.), 223: "Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character." "If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands."

Equity will jealously scrutinize a purchase by the mortgagee from an old and illiterate female mortgagor. *Hall v. Hall*, 41 So. Car. 163; 44 Am. St. Rep. 696. See note, 11 Am. St. Rep. 758.

No. 39. — HOWARD *v.* HARRIS.

(1683.)

RULE.

THE right of redemption is an essential and inseparable attribute of a mortgage security. Equity will relieve against any agreement purporting to defeat or restrict the right of redemption.

Howard v. Harris.

1 Vern. 190-195.

Mortgage. — Agreement to Defeat Right of Redemption Invalid.

[190] No agreement in a mortgage can make it irredeemable, either after the death of the mortgagor, or upon failure of issue male of his body.

Restrictions of redemption in mortgages discountenanced in equity. Maxim in equity that an estate cannot at one time be a mortgage, and at another time cease to be so by the same deed. A mortgage cannot be a mortgage of one side only.

One that claims under a voluntary conveyance may redeem a mortgage.

Where there was a great arrear of interest due on a mortgage, interest allowed for the interest reserved in the body of the deed.

No. 39. — *Howard v. Harris*, 1 Vern. 190–192.

Mr. Howard settles a jointure on plaintiff his lady before marriage, which proving defective, and not of value according to the marriage agreement, he therefore afterwards makes her an additional jointure of other lands: and afterwards Mr. Howard, in 1673, makes a mortgage to the defendant Harris for securing £1000 with interest, in *which (amongst others) [* 191] part of the lands belonging to the additional jointure was comprised; and in the mortgage there is a special clause of redemption, viz. that if Mr. Howard, or the heirs males of his body, should in June, 1686, pay the principal sum of £1000 and £60 per ann. interest in the mean time, then Mr. Howard or the heirs males of his body might re-enter; and Mr. Howard covenants that no one but he or the heirs males of his body should be admitted to redeem this mortgage, and likewise covenants to pay the £1000 on the — day of — in the year 1686, and £60 per ann. interest in the mean time, by half-yearly payments from the date of the mortgage.

Mr. Howard dies without issue; the plaintiff being a jointress of part of the mortgaged lands, and so entitled to redeem the whole, in 1677 exhibits her bill to redeem this mortgage.

The defendant by answer insists, the lands are now become irredeemable.

This cause was heard before the Lord Chancellor NOTTINGHAM; and now upon the defendant's petition came to be reheard before the LORD KEEPER, and was by them both decreed for the plaintiff.

For the plaintiff it was insisted,

1st. That restrictions of redemption in mortgages have been always discountenanced in this Court; and it would be a thing of mischievous consequence, should they prevail: for then it would become a common practice, and a trade amongst the scriveners, so to fetter the mortgagors, as to make it impracticable for them to redeem according to the precise letter of the agreement: and the plaintiff's counsel insisted, that there was no more in this case against a redemption, than there was in every [192] mortgage. It is true, here is an express covenant, that none but Mr. Howard, or the heirs males of his body, should redeem: and in every mortgage there is a proviso, that in case the money be not paid by such a day, the mortgagee shall hold the land discharged, and not only so, but there is likewise an express covenant for further assurance; so that in every mortgage

the agreement of the parties upon the face of the deed, seems to be, that a mortgage shall not be redeemable after forfeiture.

2ndly. It was argued, that it was a maxim here, that an estate cannot at one time be a mortgage, and at another time cease to be so, by one and the same deed; and a mortgage can no more be irredeemable than a distress for a rent-charge can be irrepleviable. The law itself will control that express agreement of the party; and by the same reason equity will let a man loose from his agreement, and will against his agreement admit him to redeem a mortgage.

3rdly. It is another standing rule, that a mortgage cannot be a mortgage of one side only: and here it is plain, Mr. Harris may make it a mortgage; for he has a covenant for the re-payment of his mortgage money. And for precedents was cited the case of *Kilrington v. Gardiner*, who was to redeem at any time in his lifetime; and *Sir Robert Jason's Case*.

For the defendant it was insisted, that this express agreement of the parties ought to be pursued; and they pretended the same was made upon good consideration, viz. that the defendant Harris had formerly purchased these very lands from Sir Robert Howard, father of the plaintiff's husband, who pretended himself to be seized in fee; but this land was afterwards evicted, upon pretence that Sir Robert was only tenant for [life; and the reason of this special clause of redemption was, that in case Mr. Howard should have issue male, the estate might remain in the family; but if he had none, it should be left to the defendant, as something towards a compensation for the loss in his purchase, and Mr. Harris was to submit to the loss, and not to question Mr. Howard's title. But as to this they had not a word of it in proof, saving only, that the defendant had made such a purchase; but not that this was the consideration of the agreement: and it likewise appeared, that Mr. Howard claimed by an ancient settlement from the Lord Suffolk, and not by any settlement made by his father Sir Robert.

Then it was insisted, that this additional jointure was voluntary, and the plaintiff ought not to take the estate out of the hands of a purchaser. But it was answered, he was a purchaser for no more than his mortgage money; and one that comes in by a voluntary conveyance may redeem a mortgage: and if the additional jointure was voluntary, so likewise was the agreement, that none but Mr. Howard or the heirs males of his body should redeem; and that was subsequent to the additional jointure.

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And it was further urged, that the mortgaged estate is a reversion after lives only, and is at present but £7 per ann., and that Mr. Harris did actually borrow the mortgage money to lend on this reversion; and it could not be presumed he would have so done, unless it had been in consideration that this mortgage had been made in a special manner redeemable.

But it was answered, that possibly the defendant might design such a catching bargain of this mortgage; but that was a sort of circumvention, and the worst part of the case.

After long debate, the LORD KEEPER decreed, the mortgage should be redeemed; the rather for that the defendants had a covenant for repayment of his mortgage moneys; but said, if the case had been that a man had borrowed money of his brother and had agreed to make him a mortgage, and that if [194] he had no issue male his brother should have the land; such an agreement made out by proof might well be decreed in equity.

But then for the defendant the mortgagee it was insisted, that this mortgage having been made ten years since, and of a reversion, where £7 per ann. rent was only reserved; that in this case the defendant ought to have interest upon interest, otherwise he would be a great loser in this case.

But as to that, it was answered, that the plaintiff's bill to redeem was filed so long since as 1667, and that the defendant had by answer opposed the redemption; and therefore from that time he had no pretence to an allowance of interest for his damages: and it was never known in this Court that interest upon interest was at any time allowed in any case.

But the LORD KEEPER was clear of opinion, that as to so much interest as was reserved in the body of the deed, that should be reckoned principal; for it being ascertained by the deed, an action of debt would lie for it; and therefore it was reasonable that there should be damages given for the non-payment of that money. And whereas it was urged, that this had never been practised, and that there was not any such precedent in the Court; and that if this were to be established for a rule, every scrivener would reserve all his interest half-yearly, from time to time, as long as the money should be continued out upon the security: which would be to change the law and practice in this Court, and make all mortgagors pay interest upon interest.

 No. 39. — *Howard v. Harris*, 1 Vern. 194, 195. — Notes.

But the LORD KEEPER said, he was clear in that distinction between debt and damages; and he saw no inconvenience that could ensue; it would serve only to quicken men to pay their just debts; and accordingly decreed, that after a deduction [195] of the yearly rents of the mortgaged premises out of the £60 a year payable for the interest, the defendant should be allowed interest for the residue of the said £60 a year, for which the defendant might have sued at law and recovered damages.

ENGLISH NOTES.

At common law, a mortgage created strictly an estate upon condition: a feoffment of the land was made to the mortgagee with a condition in a contemporaneous deed, by which it was provided that on payment by the mortgagor or feoffor of the mortgage money and interest at the time and place appointed, it should be lawful for him to re-enter: immediately on the livery made, the mortgagee or feoffee became the legal owner of the land, subject to the condition; if the condition was performed the feoffor re-entered and was in of his old estate; but if the condition was broken, the feoffee's estate became absolute and indefeasible, as though he had been absolute owner from the time of the feoffment, and the mortgagor had no right at law, thereafter by paying the money, to repossess himself of the estate, however much its value might exceed the amount advanced. See Litt. s. 332.

The Courts of equity, however, though they could not alter the legal effect of the forfeiture at common law, asserted in the case of mortgages as in other matters, the power of acting *in personam* though not *in rem*, and they declared that it was contrary to conscience and reason that the mortgagee should retain for his own benefit what was intended as a mere security; that the forfeiture on breach of the condition was of the nature of a penalty which ought to be relieved against; and accordingly that until foreclosure by decree of the Court, the mortgagor had a right to redeem at any time, on payment of principal, interest, and costs, notwithstanding the forfeiture at law. See *Langford v. Barnard*, Tothill, 134; *Emmanuel College v. Evans*, 1 Ch. Rep. 18. This right is called the mortgagor's equity of redemption.

As a necessary consequence of this doctrine, the Courts of equity were compelled to go further, and to lay down the rule contrary to the maxim "*modus et conventio vincunt legem*," that a mortgagor could not, by any contract entered into at the time of the mortgage, abandon or restrict his right to redeem as is expressed by the maxim "Once a mortgage always a mortgage." *Howard v. Harris*, *supra*; *East India Co. v. Atkyns*, Comyns, 349; *Seton v. Slade* (1802), 7 Ves. 265, 273.

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As was laid down by Lord HARDWICKE in *Mellor v. Lees* (1742), 2 Atk. at p. 495, if any fetter is laid upon redeeming the mortgaged estate, by some original agreement, either in the mortgage deed or in a separate deed, it would not avail, where it is done with a design to wrest the estate out of the hands of the mortgagor.

Thus stipulations in mortgages have been set aside whereby it was attempted to restrict the right of redemption to the life of the mortgagor: *Price v. Perrie*, Freem. Ch. Rep. 258; *Newcomb v. Bonham* (1681), 1 Vern. 7 (reversed on special grounds) see *infra*; or to a particular heir or class of heir: *Howard v. Harris*, *supra*; see *Floyer v. Lavington* (1714), 1 P. Wms. 268; or that the mortgagor should not redeem for twenty years: *Cowdry v. Day* (1859), 1 Giff. 316. Notwithstanding the *dictum* to the contrary in the Ruling Case, it is clear that the absence of a covenant to pay the mortgage money is immaterial; such a covenant is a necessary part of a mortgage, and in order to give the right of redemption, equity only requires to be satisfied, that the conveyance was originally intended as a security, whether it contained a covenant for payment or not. See *King v. King* (1735), 3 P. Wms. 360; *Mellor v. Lees*, *supra*.

An exception to the strictness of the rule under consideration has been allowed in some cases where mortgages have been effected by way of family arrangement, and have been mortgages in form only, but really of the nature of settlements for the benefit of the grantor's children or relatives. *Newcomb v. Bonham* (1681), 1 Vern. 7; *King v. Bromley*, 2 Eq. Cas. Abr. 595; *Jason v. Eyre*, 2 Ch. Cas. 33.

A mortgagee will be allowed, in an action for redemption or foreclosure, as against the mortgagor, to add to the principal sum originally secured by the mortgage, all further advances made by the mortgagee, either by way of further charge, or on the security of a judgment creating an actual charge on the property. *Ex parte Langston* (1810), 17 Ves. 227, 11 R. R. 66.

The right of a mortgagee to add to his security further advances may be maintained not only against the mortgagor himself, but against those claiming under him by devolution or testamentary disposition, and his creditors by simple contract or specialty and his trustee in bankruptcy. As to the right of a mortgagee having the legal estate to tack further advances as against subsequent incumbrancers and purchasers for value, see p. 528, *post*.

In order to allow a mortgagee to add further advances, they must have been made on the faith of an actual charge on the land, and not on merely personal security.

Thus further advances may be charged, where they are made on the security of a deed of further charge in the usual form of the same lands.

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Goddard v. Complin, 1 Ch. Ca. 119. So also, where the security is an agreement in writing for a further charge, however informal. *Hibernian Bank v. Gilbert* (1889), 23 L. R. Ir. 321.

So also a deposit of deeds without any accompanying memorandum will cover further advances if there is sufficient evidence that the advances were made with the intention that they should be charged on the land to which the deposited deeds relate. *Ex parte Langston*, *supra*; *Ex parte Mountfort* (1808), 14 Ves. 606, 9 R. R. 359; *Cooke v. Wilton* (1860), 29 Beav. 100.

It has been held in several cases that a mortgagee might add to his mortgage further advances secured by a judgment creating an actual charge on the land. *Baker v. Horris* (1810), 16 Ves. 397; *Ex parte Boyle* (1853), 3 De G. M. & G. 515. And it would seem that the same rule will still apply as against the trustee in bankruptcy, provided the judgment is perfected by legal or equitable execution so as to create an actual charge on the land. See Bankruptcy Act 1883 (46 & 47 Vict., c. 52), s. 9.

A mortgagee cannot add to his security as against the creditors secured or unsecured, of the mortgagor, sums secured by bond or other specialty. *Adams v. Claxton* (1801), 6 Ves. 226, 5 R. R. 263. And the mortgagor himself may redeem the mortgage without paying off the bond debt. *Challis v. Casborn*, Pre. Ch. 407; *Morret v. Paske* (1740), 2 Atk. 53; *Jones v. Smith* (1794), 2 Ves. Jr. 372, 376.

But since the Statute of Fraudulent Devises (3 & 4 Will. & Mary, c. 14), a different rule has prevailed as against the heir or devisee of the mortgagor who cannot redeem without paying off the bond as well as the mortgage. *Coleman v. Winch* (1721), 1 P. Wms., 775; *Morret v. Paske*, *supra*; *Elcy v. Norwood* (1852), 5 De G. & S. 240. But this rule is excluded by the statute 3 & 4 Will. IV. c. 104, where the real estate of the mortgagor is by his will charged with debts, in which case the mortgagee must come in for the bond debt rateably with the other creditors. *Irby v. Irby* (1855), 22 Beav. 217.

As regards simple contract debts, the same rule and exceptions appear to apply. *Newby v. Cooper* (1678), Finch. 379; *Adams v. Claxton*, *supra*; *Ex parte Hooper* (1815), 19 Ves. 477, 13 R. R. 244; *Rolfe v. Chester* (1855), 20 Beav. 610; *Talbot v. Frere* (1878), 9 Ch. D. 568, 27 W. R. 148.

AMERICAN NOTES.

This case is cited in 4 Kent's Com. p. 159, and heads a long list of cases in 3 Pomeroy's Eq. Jur., sect. 1193, followed by *Henry v. Davis*, 7 Johnson Chan. (N. Y.), 40; *Pritchard v. Elton*, 38 Connecticut, 434; *Johnston v. Gray*, 16 Sergeant & Rawle (Penn.), 361; 16 Am. Dec. 577; *Clark v. Condit*, 18

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New Jersey Equity, 358; *Robinson v. Farrelly*, 16 Alabama, 472; *Storer's Heirs v. Bound's Heirs*, 1 Ohio St., 107; *Burrow v. Hensen*, 2 Sneed (Tennessee), 658; *McNees v. Swaney*, 50 Missouri, 388; *Pierce v. Robinson*, 13 California, 116; *Rogan v. Walker*, 1 Wisconsin, 527 (but see *Glendenning v. Johnstone*, 33 Wisconsin, 347); *Reed v. Reed*, 25 Maine, 242; *Jackson v. Lynch*, 129 Illinois, 72; *Gillis v. Martin*, 2 Devereux Eq. (N. C.), 470; 25 Am. Dec. 729; *Toule v. Richards*, 1 Saxton Chan. (New Jersey), 534; 25 Am. Dec. 722; *Johnston v. Gray*, 16 Sergeant & Rawle (Penn.), 361; 16 Am. Dec. 577: "The right of redemption cannot be destroyed or taken away, for if it could, it would soon cease to exist," and so it was held that a limitation of the right to the mortgagor personally was void. These adjudications emphatically laid down the rule, "Once a mortgage always a mortgage."

"An express stipulation to redeem does not bind the mortgagor." 2 Jones on Mortgages, sect. 1039; *Peugh v. Davis*, 96 United States, 332. "It matters not how strongly the parties may express their agreement that there shall be no redemption; the intent being contrary to the rules of equity, it cannot be carried into effect." *Bayley v. Bailey*, 5 Gray (Mass.), 505.

In the recent case of *Bradbury v. Davenport*, 114 California, 593; 55 Am. St. Rep. 92 (and monographic note, p. 100), the same doctrine is held, citing *Peugh v. Davis*, *supra*, and *Villa v. Rodriguez*, 12 Wallace (U. S. Sup. Ct.), 323, where it is said that the doctrine on this point "is characterized by a jealous and salutary policy."

The doctrine, however, is restricted to contemporaneous agreements; the mortgagor may afterwards release his equity of redemption to the mortgagee. *Bradbury v. Davenport*, *supra*, and cases cited in notes, 55 Am. St. Rep. 105. But such releases are jealously scrutinized. Notes, 55 Am. St. Rep. 109; *Hyndman v. Hyndman*, 19 Vermont, 9; 46 Am. Dec. 171; 3 Pomeroy Eq. Jur. sect. 1193, and cases cited.

A power in the mortgage giving the mortgagee the right of purchase as if he were not a party, if fairly exercised, cuts off the right to redeem. *Kuoc v. Armstead*, 87 Alabama, 511; 5 Lawyer's Reports Annotated, 297.

No. 40. — JENNINGS *v.* WARD.

(1705.)

RULE.

A MORTGAGEE will not be allowed, as such, to take advantage of the necessities of the mortgagor, so as to obtain a collateral or additional advantage beyond the payment of principal, interest, and costs.

Jennings v. Ward.

2 Vern. 520-521.

Mortgage. — Collateral Advantage Disallowed.

[520] A. lends money to B. on a mortgage, and takes a covenant from B. by another deed, that if A. should think fit, B. should convey to A. so much of the mortgaged estate as should be of the value of the money lent at twenty years' purchase. Covenant decreed to be set aside as unconscionable. A man shall not have interest for his money on a mortgage, and a collateral advantage besides for the loan of it; or clog the redemption with any by-agreement.

The defendant Ward lends money to Neale, the Groom Porter, to carry on his buildings in Cock and Pye fields, and took a mortgage from him to secure sixteen thousand pounds with interest at £6 per cent, and in * another deed executed at the same time, took a covenant from Neale, that he should convey to the defendant, if he thought fit, ground rents to the value of sixteen thousand pounds, at the rate of twenty years' purchase. The bill being to redeem, the defendant insisted on that agreement; but the MASTER OF THE ROLLS decreed a redemption, on payment of principal, interest, and costs, without regard to that agreement; but set aside the same as unconscionable. A man shall not have interest for his money, and a collateral advantage besides for the loan of it, or clog the redemption with any by-agreement.

ENGLISH NOTES.

This rule is a corollary to the rule last stated and considered, and has been always most strictly applied, so as to prevent a mortgagee from obtaining, under colour of the mortgage, any advantage not properly incident to the mortgage contract.

Accordingly, a mortgagee will not be allowed to enter into a contract with the mortgagor at the time of the loan for the purchase of the equity of redemption for a fixed sum if default should be made in payment of the mortgage money at the appointed time; but the estate will continue to be redeemable, notwithstanding the contract, until foreclosure. *Price v. Perrie*, Freem. Ch. Rep. 258; *Willett v. Winnell* (1687), 1 Vern. 488; *Browne v. Edwards*, 1 Rep. in Ch. 221.

The rule under consideration has frequently been applied in cases where money advanced on mortgage of a reversionary interest has been collaterally secured by a policy of life assurance effected by the creditor

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in the name of the debtor, and the question has arisen whether the policy belonged to the creditor absolutely, or was redeemable by the representatives of the debtor. The result of the decisions appears to be that if it appears that the insurance was effected as part of the contract for the loan, or if it is to be inferred from the circumstances of the case that the insurance was in fact effected for the purpose of securing the loan, then the policy, will be redeemable upon payment to the mortgagee of what is due to him for principal, interest, premiums paid for keeping up the policy and costs, though the mortgage deed contains no proviso to that effect, or even contains a proviso to the contrary. *Holland v. Smith* (1806), 6 Esp. 11, 9 R. R. 801; *Drysdale v. Piggott* (1856), 8 De G. M. & G. 546; *Morland v. Isaac* (1855), 20 Beav. 389; *Courtenay v. Wright* (1860), 2 Giff. 337; *Bruce v. Garden* (1869), L. R. 5 Ch. 32, 39 L. J. Ch. 334, 18 W. R. 384; *Salt v. Marquis of Northampton*, 1892, A. C. 1, 61 L. J. Ch. 49, 65 L. T. 765. 40 W. R. 529. But if there is no evidence of a contract to effect the insurance by way of security, and it appears that the mortgagee effected it at his own expense and for his own protection, he will be entitled to the policy moneys absolutely for his own benefit. *Freme v. Brade* (1858), 2 De G. & J. 582; *Brown v. Freeman* (1851), 4 De G. & S. 444; *Bushford v. Cann* (1863), 33 Beav. 109, 11 W. R. 1039; *Bruce v. Garden*, *supra*; *Preston v. Neele* (1879), 12 Ch. D. 760, 40 L. T. 303, 27 W. R. 642.

There is, however, no objection to an agreement by the mortgagor, though entered into at the time of the mortgage, whereby a right of pre-emption is given to the mortgagee in case the mortgagor should sell the equity of redemption, for in such cases the mortgagor is left full liberty either to redeem or sell, and, if he sells, he is not tied down to any price. Such agreements are accordingly enforceable: *Orby v. Trigg*, 9 Mod. 2, 2 Eq. Cas. Abr. 599; *Brown v. Edwards*, 1 Rep. in Ch. 221; but they are construed strictly: *Re Edwards*, 11 Ir. Eq. Rep. 367.

Moreover, though a mortgagee may not stipulate for purchase of the equity of redemption at the time of the loan and as part of the mortgage contract, he is as competent as any other person to enter into a subsequent and independent agreement for the purchase of the mortgaged property from the mortgagor, though he does not give the full value. *Waters v. Groom* (1844), 11 Cl. & Fin. 684; or even though the consideration be merely a release of what is owing on the mortgage. *Cotterell v. Purchase*, Cas. tem. Talbot, 61; *Purdie v. Millett* (1829). Tam. 28. Of course such an agreement will be avoided by fraud or pressure on the part of the mortgagee. *Ford v. Olden* (1867), L. R. 3 Eq. 461, 36 L. J. Ch. 651, 15 L. T. 558. See *Melbourne Banking*

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Corporation v. Brougham (1882), 7 App. Cas. 307, 51 L. J. P. C. 65, 46 L. T. 603, 30 W. R. 925; *Barton v. Bank of New South Wales* (1890), 15 App. Cas. 379.

In carrying out the principle that a mortgagee shall not be allowed to obtain a collateral advantage so as to clog the equity of redemption, the Courts have imposed on him numerous restrictions, for he is entitled to no benefit beyond his principal, interest, and costs, and to allow a collateral advantage would open the door to fraud and oppression.

Thus, as a general rule, a mortgagee will not be allowed to make any charge by way of bonus or commission in consideration of the advance pursuant to stipulations made at the time of the advance. *Broud v. Selfe* (1863), 9 Jur. (N. S.), 885; *Barrett v. Hartley*, L. R. 2 Eq. 789, 12 Jur. (N. S.) 426; *James v. Kerr* (1889), 40 Ch. D. 449, 58 L. J. Ch. 353, 60 L. T. 212, 37 W. R. 279. A distinction, however, is drawn where a bonus is deducted from or handed back to the mortgagee out of the sum advanced at the time of the advance without improper pressure. *Mainland v. Upjohn* (1889), 41 Ch. D. 126, 58 L. J. Ch. 361, 60 L. T. 614, 37 W. R. 411. And a further exception to the rule holds where the advance is on the security of a reversionary interest, in which case it is permissible for the mortgagee to stipulate that a larger sum than that actually advanced shall be paid to him on the falling in of the reversion: *Webster v. Cook* (1867), L. R. 2 Ch. 542, 13 W. R. 1001; provided there is no undue advantage taken of the necessities of the reversioner: *Beynon v. Cook* (1875), L. R. 10 Ch. 389, 32 L. T. 353.

So also, a mortgagee in possession will not be entitled to charge the mortgagor with any commission or remuneration for personal trouble in collecting rents, &c. See *Eyre v. Hughes*, No. 43, p. 385 *post*, and the notes therein.

Again, a stipulation made at the time of an advance that the normal rate of interest shall be raised on default in punctual payment of interest will be relieved against: *Bonafous v. Rybot*, 3 Burr. 1375; but a subsequent and independent agreement for payment of interest at a higher rate in consideration of forbearance on the part of the mortgagee has been upheld. *Brown v. Barkham* (1720), 1 P. Wms. 652. See *Law v. Glenn* (1867), L. R. 2 Ch. 634. The validity is well established of clauses fixing a rate of interest with a proviso reducing that rate on punctual payment. *Jory v. Cox*, Pre. Ch. 160; *Nicholls v. Maynard* (1747), 3 Atk. 519, p. 141 *ante*. See *Wallingford v. Mutual, &c. Society* (II. L. 1880), 5 App. Cas. 685, 702, 50 L. J. Q. B. 49, 43 L. T. 258, 29 W. R. 81; and any condition as to time annexed to such provisos will be strictly enforced: *Lady Holles v. Wyse* (1693), 2 Vern. 289; *Burton v. Slattery* (1725), 5 Bro. P. C. 233; though a single default will not

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generally deprive the mortgagor of the advantage of the proviso on future occasions. See *Stanhope v. Manners* (1763), 2 Eden. 197.

See, as to stipulations in mortgage deed for conversion of interest from time to time into principal by way of compound interest, *Daniell v. Sinclair*, No. 23, p. 144 *ante*, and notes thereto.

Where a mortgage by a publican to a brewer contained a covenant by the mortgagor to buy from the mortgagee all beer and malt liquors during the security, it was held that the covenant was reasonable and did not clog the equity of redemption, and an injunction was granted to restrain the breach of this covenant. *Biggs v. Hoddinott*, (C. A.) 1898, 2 Ch. 307, 67 L. J. Ch. 540.

AMERICAN NOTES.

Principal case cited in 2 Jones on Mortgages, sects. 1042, 1044; 3 Pomeroy's Eq. Jur., sect. 1193. See notes, No. 39, *ante*, p. 364. See *Sheckell v. Hopkins*, 2 Maryland Chan. 89. A subsequent agreement by which a contingent forfeiture is made absolute may be void: *Tennery v. Nicholson*, 87 Illinois, 464; *Batty v. Snook*, 5 Michigan, 231; at all events will be viewed suspiciously and watched narrowly by a Court of equity: *Hyndman v. Hyndman*, 19 Vermont, 9; 46 Am. Dec. 171.

No. 41. — CASBORNE *v.* SCARFE AND INGLIS.

(1737.)

RULE.

A MORTGAGOR has in equity, not a mere right of entry on performance of the condition, but an alienable and devisable estate in the mortgaged property till foreclosure.

Casborne v. Scarfe and Inglis.

1 Atk. 603-606.

Mortgage. — Estate in Equity of Mortgagor.

A. seized in fee of a freehold estate, mortgages it, and afterwards intermarries with B. A. dies and the mortgage is not redeemed during the coverture; this is, notwithstanding, such a seisin in the wife as entitles the husband to be tenant by the curtesy of the mortgaged premises, for in this Court the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.

The father of the plaintiffs devised to Anne his daughter, the plaintiffs' eldest sister, all his estate, freehold and copy-

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hold, in fee, charged with £200 apiece to the plaintiffs. Anne, after her father's death, possessed the several estates, and afterwards intermarried with the defendant Inglis, and soon after died, leaving issue a son, who died an infant and without issue, upon whose death the plaintiffs, as heirs at law both to the infant and their sister, became entitled to the real estate. Anne Inglis, before her marriage, mortgaged part of the freehold premises to the defendant Scarfe in fee for £900. The bill is brought against the mortgagee and the husband for an account, and for the direction of the Court.

The defendant Alexander Inglis insisted that, having had issue by his wife, he was entitled to an estate for life, as tenant by the curtesy, in his late wife's freehold premises, subject to the mortgage of the defendant Scarfe.

On the 5th of May, 1735, the MASTER OF THE ROLLS (Sir JOSEPH JEKYLL), on hearing the cause, was of opinion the defendant Inglis was not entitled to a tenancy by the curtesy in the estate comprised in the mortgage, Reg. Lib. A. 1734, fol. 602.

The defendant appealed from this decree to LORD CHANCELLOR, and the cause came on before his Lordship on the 28th of January, and 4th of March, 1737.

For the plaintiffs it was insisted, the equity of redemption was no actual estate or interest in the wife, but only a power in her to reduce the estate into her possession again, by paying off the mortgage; it was compared to the case of a proviso for a re-entry in a conveyance and no re-entry ever made, and to a condition broken and no advantage ever taken thereof; that the wife was never seised in fee in law, because the legal estate was out of her by virtue of the mortgage, but had only a bare possession, and was in receipt of the rents and profits; so that the mortgagor had merely a right of action or a suit in a Court of equity in order that the estate might be re-conveyed to her upon complying with the terms in the mortgage; that it was the laches of the husband,—he did not pay off the mortgage money, which would have re-vested the estate in the wife; but not having done that, there is no more reason that he should be a tenant by the curtesy here, than that he should have the benefit of a seisin in law in the wife, which he cannot have, for there must be an actual seisin; for the words of Lord Coke in his comment upon the 35 sect. of Littleton are, “A man shall

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not be tenant, by the curtesy of a bare right, title, use, or of a reversion, or a remainder, expectant upon any estate of [604] freehold, unless the particular estate be determined or ended during the coverture." It was likewise said, if it be considered as an interest, it is merely a contingent one, as it is uncertain whether the mortgagor will ever take back the estate again, for it was entirely at her election, and supposing it to be mortgaged to the value, though she had a right to redeem, yet she was under no obligation to do it: and it does not appear in this case the wife ever intended it, and if the law should cast the estate on the husband, he, by never paying the interest during his life, might load the inheritance in such a manner that it would never be of any benefit to the heir.

The Attorney General cited the case of *Penville v. Luscombe*, c. s. cited 7 Vin. 160, at the Rolls, the 4th of February, 1728, where the MASTER OF THE ROLLS was strongly inclined to think there could be no *possessio fratris* of an equity of redemption. He likewise cited the case of *Reynolds v. Messing*, at the Rolls, the 20th of February, 1732 (Sir JOSEPH JEKYLL), where it was held a wife was not dowable of an equity of redemption in the case of a mortgage in fee; and in the case of *Robinson v. Tongue*, Michaelmas Term, 1730, Lord Chancellor KING was of the same opinion, 3 Vin. 145, pl. 28.

Mr. Fazakerley, *e contra*, insisted that the husband's paying off the mortgage would have been buying what the law gives him as a tenant by the curtesy; that though at law a mortgage in fee is a revocation of the will, yet in a Court of equity it is otherwise; and here a mortgagor is considered as having still the ownership of the estate, which is only a pledge or security for the money of the mortgagee, without making any alteration in the property, for the estate retains all its former qualities as any other not in mortgage.

That the argument *ab inconvenienti* falls to the ground, for as a tenant for life he will be obliged to keep down the interest during life, so that there is no danger of his injuring the inheritance: that there is a difference between a tenant by the curtesy, and a tenant in dower with regard to a trust, for there may be a tenancy by the curtesy of a trust, though a woman is not endowable of it; but what were the grounds of this distinction he would not take upon him to say, for as both by the decrees of

this Court, and in the house of Lords, it has been so determined without giving any reasons, he would not presume to offer any. 2 Vern. 585 and 680.

That in the case of *Pencille v. Luscombe*, nothing was therein determined by the MASTER OF THE ROLLS, who was very doubtful in the principal point; but Mr. Fazakerley said he had a note of a case with the same names, determined by Lord COWPER in 1716, who held directly the contrary, that there might be a *possessio fratris* of an equity of redemption, and if so, the rule of *equitas sequitur legem*, in cases of property, is certainly the best guide;

and if this Court upon niceties should relax this rule, it [605] would be a precedent to dispense with it in other cases. He

said it was agreed the principal point had never been determined, though it is at the same time admitted there are many cases where, after a recovery at law, either of dower or tenancy by the curtesy, a trust term has been laid out of the way for the benefit of dowress, &c.

Mr. Murray of the same side said, the statute of uses interposes only between a *cestui que trust* and his own feoffee, strictly speaking; that in this Court, the *cestui que trust* is considered as the owner of the land, and the trustee, like the conusee of a fine, only the mere instrument, and no more. That the case of *Lady Radnor v. Vandebendy*, Show. Parl. Cas. 6, was affirmed in the House of Lords for this reason, because all conveyances have insisted that where there is a trust term it may be safely purchased without any danger of dower, and is one reason for the distinction between a dowress and a tenancy by the curtesy.

That a mortgage in fee is no more than a charge upon the land; and that in the case of *Tabor v. Grover*, 2 Vern. 367, it was held, a mortgage in fee (though two descents cast, and though more was due upon it than the value, and though the mortgagor, by his answer, said he would not redeem) should go to the executor, and not to the heir of the mortgagee, the equity of redemption not being foreclosed or released. The several cases following were likewise cited by the defendant's counsel: *Hall v. Deuch*, 1 Vern. 329; *Amhurst v. Dowling*, 2 Vern. 401; and *Strode v. Lady Russel*, 2 Vern. 625, and *Lady Williams v. Wray*, 8 Co. Rep. 96, and *Pawlet and the Attorney General*, Hard. 467, 469.

After the point had been argued on both sides, The LORD CHANCELLOR declared his surprise that this matter, as it seemed a case

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which must frequently happen, should never have been brought before the Court till now, and as it was a question of great consequence and general concern, should take time to give his opinion.

On the 25th of March, 1738, the cause stood for judgment.

The LORD CHANCELLOR: This question depends on two considerations.

First, What sort of interest an equity of redemption is considered to be in this Court.

Secondly, What is requisite to entitle the husband to be tenant by the curtesy.

First, An equity of redemption has always been considered as an estate in the land; for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets.

By a devise of all lands, tenements, and hereditaments, a mortgage in fee shall not pass,¹ unless the equity of redemption be

¹ (Reporter's note.) This rule as laid down here by Lord HARDWICKE, and by the reports of the two cases of *Wynn v. Littleton*, 1 Vern. 3, and *Litton v. Russell*, 2 Vern. 621, deserves some consideration. It is a point which frequently occurs in the practice of a conveyancer. The question is, Whether we must understand his Lordship's meaning to be, that the general devise of all lands, tenements, and hereditaments will neither pass the legal nor beneficial estate of mortgagees in fee after forfeiture, or whether those words are only incompetent to pass the beneficial interest. If the latter, the rule, generally speaking, is certainly right; because, the beneficial interest being in fact nothing but the money due on the mortgage, and the lands mortgaged being considered in equity merely as a security for a personal debt, it is very evident that such personal or beneficial interest cannot pass by words peculiarly adapted to transfer real property; unless in some particular instances, as where the testator has had no other lands than those mortgaged to him, in which case the mani-

fest intention would hold against the general construction. See *Clarke v. Abbot*, Barn. Cha. Rep. 457, 461. But I take it that there is a very obvious distinction between the legal estate of a mortgagee in fee after forfeiture, and his beneficial interest, as to the operation of a devise. The latter would certainly pass by a residuary bequest of all his personal estate; yet it is clear that the former would not; which, if not vested in some particular person by the will, would in such case descend to the heir at law of the testator as a trustee for the devisee of a personal estate. *Vide Attorney General v. Meyrick*, 2 Ves. 46, and the decree in *Wynne v. Littleton* cited *infra*. But as the mortgagee is considered as to the legal estate and inheritance merely as a trustee (*vide post*, 374; 2 Vern. 401), if he should devise all and every his real estate to A. and his heirs, this would according to the determination in *Marlow v. Smith*, 2 P. W. 198, pass the legal estate; and if he should likewise bequeath all his personal estate to B., this would pass the mort-

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foreclosed; and if, after such devise made, a foreclosure is had, yet such estate shall not pass by those general words of lands,

gage debt, and A. would thereby become a trustee for B. The reasoning in *Marlow v. Smith* was, that the legal estate being in the trustee, it was in the eye of the law his estate and his property, and therefore passed by a devise of his estate. If then there be a settled distinction between the legal and beneficial interest of a mortgagee, and if the words "real estate" will pass such legal estate, why will not the general devise of lands, tenements, and hereditaments have that effect, when unconnected with circumstances indicative of the testator's intention to exclude such a construction? The word "hereditament" must, I think, be as operative as the words "real estate." The former is expressive of the latter. It is said in *Sir Thomas Littleton's Case*, 2 Vent. 351, that, "if a man had lands in fee, and other lands mortgaged to him in fee, by a devise of all his lands the mortgage would pass." The case *Ex parte Bowes*, 26th July, 1744, seems to confirm the above observations in their utmost extent. There, one Thurland mortgaged the reversion of the manors of Bigging and Tamworth and divers lands and hereditaments in the county of Surrey to Henry May in fee, who by his will devises all his manors, farms, lands, tenements, hereditaments, and real estate in Sussex, Kent, and Middlesex, and elsewhere in England in possession, reversion, or otherwise, to certain uses, which now vest an estate tail in Thomas Knight, an infant, with remainders over. The mortgage money was paid to the executor of May; but the legal estate has not been reconveyed. The question now is, Whether the legal estate of the mortgaged lands was vested by virtue of the above devise in Thomas Knight, the infant. And if so, whether he could convey by recovery pursuant to the Stat. 7 Ann. Lord HARDWICKE decreed, the infant to convey the legal estate: "And it appearing under the devise in the will of the said Henry May, that the said Thomas Knight, the infant, is tenant in tail, with remainders over, it is ordered, that all proper parties are to concur in all necessary acts for the infant's suffering a

common recovery, in order to make the conveyance effectual." Reg. Lib. A. 1743. fol. 537. It is very clear that the testator in the above case could not intend to create an estate tail in the legal estate of the mortgaged lands; and yet Lord HARDWICKE thought that the legal operation of the devise ought to hold against the intent. As to the case of *Wynne v. Littleton*, which as reported in Vernon is usually cited as an authority to the contrary; it appears from the Register's book, B. 1680, fol. 452, that it was decreed, that Lady Littleton (the administratrix) was entitled to the mortgages in question, as part of the testator's personal estate; and the decree directs, that upon payment of principal and interest by the mortgagor (who had brought a cross bill to redeem), "the said dame Anne Littleton and the plaintiff Sir John Wynne do convey and assure to the said Mr. Prior and his heirs all their title, estate, and interest in and to the said mortgaged premises." As the decree directs Sir John Wynne to be a party in the re-conveyance, it is clear that he was supposed to have the legal estate in him, because the decree previously declared he had no beneficial interest by the devise. Now the Register's book does not mention whether he was heir at law to the testator, but merely that he was the testator's near kinsman, whilst administration was granted to Lady Littleton as next of kin. The doubt therefore still remains, whether the legal estate vested in Sir John Wynne as heir at law, or as devisee. If as devisee, (and which I apprehend to be the case), then the above observations are established in their fullest extent. If as heir at law, it shows that the legal estate does not even in equity necessarily follow the beneficial interest, and pass as personal property to the executor or administrator, but requires certain technical words, peculiarly adapted to the transfer of real property, in order to pass it. It is observable too in the above case of *Wynne v. Littleton*, that the testator had made a charge upon the lands devised, which rather seemed to show that

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tenements, and hereditaments, because a foreclosure is considered as a new purchase of the land.

The interest of the land must be somewhere, and cannot be in abeyance; but it is not in the mortgagee, and therefore must remain in the mortgagor. A. devises his estate and after makes a mortgage in fee, though that is a total revocation in law, yet in this Court it is a revocation *pro tanto* only.

It is certain the mortgagee is not barely a trustee to the mortgagor, but to some purposes, *videlicet*, with regard to the inheritance he certainly is, till a foreclosure.

Secondly, At common law, four things are necessary to entitle the husband to the tenancy by the curtesy, marriage, issue, death of the wife, seisin in fact. In this case the three first concur, but it is objected that here is no seisin whatever of the legal estate in the wife in the consideration of the law. But that is not the present question; the true question is, if there was such seisin or possession of the equitable estate in the wife as in this Court is considered as equivalent to an actual seisin of a freehold estate at common law; and I am of opinion there was.

Actual possession, clothed with the receipt of the rents and profits, is the highest instance of an equitable seisin, both of which there was in this case, and that a husband shall be tenant by the curtesy of the equitable estate of the wife, has been often determined, as in *Sweetapple v. Bindon*, 2 Vern. 536, which was a much stronger case than this, for in that case there was neither seisin nor land, and in 2 Vern. 680, it was held that lands articleed for only will pass by a will.

The principal objections are two.

First, Laches and neglect in the husband, by not paying off the mortgage.

Secondly, That the rule ought to be equal between dower and curtesy, and that dower cannot be of a trust estate.

As to the first, it is not similar to the cases of laches in the husband, viz., as in a case where entry is requisite, because it is

those mortgaged were not intended to be the subject of the devise. With respect to the case of *Litton v. Russell* it can afford no argument on either side of the question: for the decree in that case, as it is stated in the Register's book, takes no notice of any mortgages, except those whereof the testator had after the making

his will purchased the equity of redemption. Indeed it appears from the bill and answers, that there was only one other mortgage, which was of a copyhold estate, not surrendered to the use of the testator's will, Reg. Lib. B. 1707, fol. 510.

nothing near so easy to pay off a mortgage as to make an entry; and it holds equally strong in the case of a trust estate, for a husband may more easily get a decree for his trustees to convey, than a decree to redeem a mortgage, which is necessarily attended with many delays.

The second objection proves too much, if anything, and entirely fails by the precedents of this Court; if any innovations were to be made, I am of opinion the nearest way to right would be to let in the wife to dower of a trust estate, and not to exclude the husband from being tenant by the curtesy of it, and there can be no inconvenience to the heir at law, for he would have the same remedy in this Court, to make a tenant by the curtesy keep down the interest as against any other tenant for life: for these reasons I am of opinion the defendant is entitled to be tenant by the curtesy, and the decree at the Rolls, as to this part, must be reversed. Reg. Lib. A., 1737, fol. 408.

ENGLISH NOTES.

The Ruling Case above set out establishes the rule, recognised in numerous subsequent cases, that the person entitled to the equity of redemption in a mortgaged estate is in equity until foreclosure the owner of the property and possessed of it in right of his original estate. See *Heath v. Pugh* (C. A. 1882), 16 R. C. 377, (6 Q. B. D. 345, 360, 50 L. J. Q. B. 473, 44 L. T. 327, 29 W. R. 904); *Tarn v. Turner* (C. A. 1888), 39 Ch. D. 456, 460, 57 L. J. Ch. 1085, 59 L. T. 742, 37 W. R. 276.

An entail of an equity of redemption may now be barred in England under the Fines and Recoveries Act (3 & 4 Will. IV., c. 74), and in Ireland by the corresponding Statute (4 & 5 Will. IV., c. 92).

Formerly an equity of redemption was not subject to dower, being an equitable estate: *Dixon v. Sarille*, 1 Bro. C. C. 326; but the law in this respect was altered by the Statute 3 & 4 Will. IV., c. 105.

The above Ruling Case incidentally decided that an equity of redemption is subject to curtesy. See also *Casborne v. Inglis* (1820), 2 Jac. & W. 194.

Formerly, an equity of redemption of a mortgage in fee was liable to be forfeited to the Crown for treason but not for felony. *Attorney-General v. Sands* (1670), 8 R. C. 150 (Hard. 488). Now, however, forfeiture for treason and felony are abolished by the Statute 33 & 34 Viet., c. 23, and the equity of a redemption belonging to a convict rests in his administrator during the continuance of his sentence.

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On the death of a person intestate and without heirs an equity of redemption vested in him did not formerly escheat to the Crown. See *Gordon v. Gordon* (1819), 3 Swanst. 400, 19 R. R. 230; but now by the Intestate Act, 1884 (47 & 48 Vict., c. 71), the law of escheat applies to all equitable estates or interests in land. As to copyholds see Co. Litt. 215 a: *Thurston v. Attorney-General* (1685), 1 Vern. 340; *Viscount Downe v. Morris* (1844), 3 Hare. 394, 13 L. J. (N. S.) Ch. 337.

It is to be observed that the Crown not being mentioned in the Land Transfer Act, 1897 (60 & 61 Vict., c. 65), is not bound thereby, and accordingly that an equity of redemption which escheats will not pass to the personal representatives of the intestate for purposes of administration but will vest immediately in the Crown. See *Re Hartley* (1898), W. N. 155.

A mortgagor being in equity the owner of the mortgaged property may without the concurrence or consent of the mortgagee sell the equity of redemption or any rights incident thereto. *Steers v. Rogers* (H. L.), 1893, A. C. 232, 62 L. J. Ch. 671, 68 L. T. 726. And in the event of the mortgagor's bankruptcy the trustee may dispose of any such rights. *Hartley v. Russell* (1825), 2 Sim. & St. 244, 25 R. R. 196. See *Seear v. Lawson* (C. A. 1880), 15 Ch. D. 426, 434, 49 L. J. Bk. 69, 42 L. T. 893, 28 W. R. 929.

An equity of redemption may be the subject of mortgage *toties quoties*, and the priorities of successive mortgagees thereof will be regulated by the maxim *qui prior est tempore potior est jure*; except so far as such priority may be displaced by tacking; as to which see p. 523 *et seq.*, *post*.

The powers of mortgagors to lease the mortgage lands without the concurrence of their mortgagees have been already considered.

Where the entirety of an estate is subject to a mortgage several co-owners of the equity of redemption may affect a partition thereof without the concurrence of the mortgagee. *Swan v. Swan* (1820), 8 Price, 518, 22 R. R. 770; *Waite v. Bingley* (1882), 21 Ch. D. 674, 51 L. J. Ch. 651, 30 W. R. 698. But of course the mortgagees' rights and remedies will not be affected by the partition. *Sinclair v. James*, 1894, 3 Ch. 554, 63 L. J. Ch. 873, 71 L. T. 483.

By virtue of Part I. of the Land Transfer Act 1897 (60 & 61 Vict., c. 65), an equity of redemption in real estate vests on the death of the owner thereof in his personal representatives and is applicable in their hands for payment of his funeral and testamentary expenses and debts: on completion of the administration, the devisee or heir is entitled to have such estate effectually vested in him by assent or conveyance. Independently of this Act a devise of an equity of redemption will be

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valid if made with the like formalities as the law requires for a devise of land. *Phillips v. Hill*, 1 Rep. in Ch. 190.

Before the Wills Act (1 Viet., c. 26), which makes wills speak from the death, a subsequent mortgage of the devised land generally operated only as a revocation *pro tanto*: *Perkins v. Walker* (1685), 1 Vern. 97; but a devise was totally revoked where the subsequent mortgage was made by a disentailing deed limiting the equity of redemption to the testator in fee: *Sparrow v. Hardecastle* (1748), 3 Atk. 798; *Locke v. Foote* (1833), 5 Sim. 618, 35 R. R. 192.

On the death of an owner of an equity of redemption intestate the equitable interest will devolve (except if and so far as the case comes within the Act of 1897) as the land itself would have done: *i. e.*, generally on the heir at law, or if the land be gavelkind or borough English, then upon the persons by custom entitled thereto, or in the case of copyhold on the customary heir of the mortgagor. *Fawcett v. Lowther* (1751), 2 Ves. Sen. 300; *Daly v. Nalder* (1865), 11 Jur. (N. S.) 92.

Other incidents of an equity of redemption which require notice are as follows: —

The mortgagor of a manor while in possession may hold Courts. *Ex parte Bisdee, Re Baker* (1840), No. 21, p. 138, *ante* (9 L. J. (N. S.) Bk. 9, 1 M. D. & De G. 333).

A mortgagor of an advowson has the right to nominate to a living on a vacancy, and the mortgagee must present the person so nominated. *Jory v. Coe*, Prec. in Ch. 71; *Amhurst v. Dawling* (1700), 2 Vern. 401.

A mortgagor in possession has the right of voting for Parliament provided the interest on the mortgage does not reduce the annual value below forty shillings (6 & 7 Viet., c. 18, s. 74). See *Lee v. Hutchinson* (1849), 8 C. B. 18.

The ownership of a mortgagor while in possession is sufficient to give him a right of settlement under the Poor Laws. *Re v. Inhabitants of Catherington* (1790), 3 T. R. 771. See 4 & 5 Will. IV., c. 76, s. 68.

A director of a company mortgaging his shares does not lose his qualification as director. *Cumming v. Prescott* (1843), 2 Y. & C. Ex. 488; *Pulbrook v. Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610, 48 L. J. Ch. 65, 27 W. R. 377.

A mortgagor in possession may bring or defend actions in respect of the mortgaged property against persons other than the mortgagee. *Sellick v. Smith* (1826), 11 Moore 459; see 36 & 37 Viet., c. 66, s. 25 (5). As a general rule the mortgagee having the legal estate must be made a party to such actions: *Wood v. Williams* (1819), 4 Madd. 186, 20 R. R. 291; especially if his interests are in any way likely to be

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affected by the result of the action: *Van Gelder ApSimon, &c. Co. v. Sowerby Bridge, &c. Co.* (C. A. 1890), 44 Ch. D. 374, 59 L. J. Ch. 583, 63 L. T. 132; *secus* if the mortgagee cannot possibly be in any way affected by the result: *Hughes v. Cook* (1858), 24 Beav. 407; *Pearse v. Hewett* (1835), 7 Sim. 471.

AMERICAN NOTES.

See notes, *ante*, p. — . This case is cited in 1 Jones on Mortgages, sect. 6. This author observes: "Courts of equity could not alter the legal effect of the forfeiture which followed a breach of the condition, and did not attempt to do so; but they regarded it as in the nature of penalty which ought to be relieved against. They recognized the purpose of the mortgage as merely a pledge to secure a debt, and declared it unreasonable that the mortgagee should, by the failure of the debtor to meet his obligations at the day appointed, be entitled to keep as his own what was intended as a pledge. At law the legal right of the mortgagor to have his estate again was forfeited; but in equity he was allowed still to reclaim it upon payment of his debt with interest. This is the equity of redemption. From the combined influence of these rules of law and principles of equity has come the present law of mortgages.

"The equitable view of a mortgage, as merely a security for the payment of a debt or the performance of some duty, is that which is at the present day so constantly presented, both in theory and practice, that it is difficult to realize that the rules of the common law in respect to it remain for the most part unaltered; that the transaction is still a conveyance conditional upon the non-payment of the debt on a day certain, and that upon a breach of the condition the mortgagor at law is without right or remedy. The whole legal estate upon the default passes irrevocably to the mortgagee. But at this point a Court of equity allows and enforces the right of redemption; and the jurisdiction of Courts of equity to give this remedy is fully recognized in Courts of law."

This case is also cited in Pomeroy's Eq. Jur., sect. 162, with the observation: "The English system has not been adopted to its full extent in any American State," and he then describes the two theories of mortgage prevalent here, as set forth in notes to No. 1, *ante*, p. 5. At sect. 1181, this author says: "While the mortgagee is still regarded at law as vested with the legal title followed by all of its incidents, the following general theory is established as a part of the equity jurisprudence. The mortgagor, both after and before a breach of the condition, is regarded as the real owner of the land subject to the lien of the mortgage, and liable to have all his estate, interest, and right finally cut off, and destroyed by a foreclosure; he is vested with an equitable estate in the land which has all the incidents of absolute ownership; it may be conveyed or devised, will descend to his heirs, may be cut up into lesser estates, and generally may be dealt with in the same manner as the absolute legal ownership, always subject, however, to the lien of the mortgage. On the other hand, the mortgage is regarded primarily as a security; the debt is the principal fact, and the mortgage is collateral thereto;

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the interest which it confers on the mortgagee is a lien on the land, and not an estate in the land; it is a thing in action, and may therefore be assigned and transferred without a conveyance of the land itself; it is personal assets, and on the death of the mortgagee it passes to his executors or administrators, and not to his heirs.

"As these two conflicting theories have existed side by side, it follows that the rights, liabilities, and remedies of the mortgagor and the mortgagee in England have been very different when administered by the Courts of law or the Court of Chancery. In law, the mortgagee is clothed with the entire legal estate, while the mortgagor has no estate whatever, and after a default no right except that given by the statute, mentioned in a former paragraph. In equity, the mortgagee has no estate, but only a lien; while the mortgagor is clothed with the equitable estate called the 'equity of redemption,' which is to all intents and purposes the full ownership, except that it is subject to be cut off and destroyed by a proceeding to enforce the mortgage. It should be carefully noticed that by this theory the mortgagor's estate is wholly an equitable one; neither in equity nor at law is he regarded as retaining the legal estate. In law, the mortgagee is entitled to possession of the land even before the condition is broken, and may recover such possession upon his legal title, either before or after condition broken, in an action of ejectment against the mortgagor, or against any other person not having a paramount title; while the mortgagor cannot maintain ejectment for the possession even against a third person, since the legal title is outstanding in the mortgagee, and a plaintiff can recover an ejectment only upon the strength of his own legal title. In equity, neither the mortgagee nor the mortgagor can maintain an action for the mere possession, since that remedy is wholly a legal one; but the mortgagor may maintain a suit to redeem from the mortgagee in possession, and having thus redeemed is entitled to a reconveyance and delivery of possession. In law, the mortgagee may convey the land itself by deed, or devise it by will, and on his death intestate, it will descend to his heirs. In equity, his interest is a mere thing in action assignable as such, and a deed of the land by him would operate merely as an assignment of the mortgage; and in administering the estate of a deceased mortgagee, a Court of equity treats the mortgage as personal assets, to be dealt with by the executor or administrator. The English law is strictly logical in these conclusions, but the American legal theory, by a curious inconsistency, rejects them. The difference between the English legal theory and the American legal theory in this respect should be carefully noted. Even in those States which have preserved the legal and the equitable theories distinct, and which have to some extent adopted the English system, the legal theory has been more or less modified by the equity doctrine."

In *Barrett v. Hinckley*, 124 Illinois, 32; 7 Am. St. Rep. 331, the Court observed, after stating the English doctrine at law: "Courts of equity, however, from a very early period, took a widely different view of the matter. They looked upon the forfeiture of the estate at law because of non-payment on the very day fixed by the mortgage as in the nature of a penalty, and, as in other cases of penalties, gave relief accordingly. This was done by allow-

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ing the mortgagor to redeem the land, on equitable terms, at any time before the right to do so was barred by foreclosure. The right to thus redeem after the estate had become absolute at law in the mortgagee was called the 'equity of redemption,' and has continued to be so called to the present time. These Courts, looking at the substance of the transaction rather than at its form, and with a view of giving effect to the real intentions of the parties, held that the mortgage was a mere security for the payment of the debt; that the mortgagor was the real beneficial owner of the land, subject to the encumbrance of the mortgage; that the interest of the mortgagee was simply a lien and encumbrance upon the land, rather than an estate in it. In short, the position of mortgagor and mortgagee were substantially reversed in the view taken by Courts of equity. These two systems grew up side by side, and were maintained for centuries without conflict, or even friction, between the law and equity tribunals by which they were respectively administered. The equity Courts did not attempt to control the law Courts, or even question the legal doctrines which they announced. On the contrary, their force and validity were often recognized in the relief granted. Thus, equity Courts, in allowing a redemption after a forfeiture of the legal estate, uniformly required the mortgagee to reconvey to the mortgagor, which was of course necessary to make his title available in a Court of law.

"In maintaining these two systems and theories in England, there was none of that confusion and conflict which we encounter in the decisions of the Courts of this country, resulting chiefly from a failure to keep in mind the distinction between Courts of law and of equity, and the rules and principles applicable to them respectively. The Courts there, by observing these things, kept the two systems intact, and in this condition they were transplanted to this country, and became a part of our own system of laws. But other causes have contributed to destroy that certainty and uniformity which formerly prevailed with us. Chiefly among these causes may be mentioned the statutory changes in the law in many of the States, and the failure of the Courts and authors to note those changes in their expositions of the law of such States. Perhaps another fruitful source of confusion on this subject is the fact that in many of the States the common-law forms of action have been abolished by statute, and instead of them a single statutory form of action has been adopted, in which legal and equitable rights are administered at the same time and by the same tribunal. Yet the distinction between legal and equitable rights is still preserved, so that although the action, in theory, is one at law, it is nevertheless subject to be defeated by a purely equitable defence."

"The case of mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the Courts of law." 4 Kent's Com., p. 138, citing the principal case.

No. 42. — *Ex parte Wilson*, 2 Ves. & Bea. 252, 253. — Rule.

No. 42. — EX PARTE WILSON.

(CH. 1813.)

RULE.

A MORTGAGOR is not accountable to the mortgagee for rents and profits received while in possession, though the security proves deficient.

Ex parte Wilson.

2 Vesey & Beames, 252-253 (13 R. R. 75).

Possession of Mortgagor. — Entitled to Rents without Account.

[252] Mortgagee not entitled to an account of past rents from the mortgagor. Mortgagee's right to distrain after notice.

Under a bill to put a term out of the way in some cases an account of the past rents given.

The petition stated a mortgage by William Adams and John Stuart to the petitioner for £1000: the premises being at that time under lease; and the mortgage made expressly subject and without prejudice to that lease; that the principal sum of £1000 and a considerable arrear of interest was due to the petitioner; that Adams died in March, 1811; and Stuart became bankrupt in January, 1812; that the petitioner gave notice to the tenant in possession to pay the rent to the petitioner only: but notwithstanding such notice, and that the premises were a scanty security, the assignees had received the rent, amounting to £120 7s. 4d.

The petition prayed, that the assignees may be ordered to pay to the petitioner the said sum of £120 7s. 4d., an account of the principal, interest, and costs, the usual order for sale: and that the petitioner may be at liberty to prove for the deficiency.

Mr. Montague, in support of the petition.

Sir Samuel Romilly, for the assignees.

The LORD CHANCELLOR: —

Admitting the decision of *Moss v. Gallimore*, Doug. 279 (p. 404. *post*), to be sound law, I have been often surprised by the statement, that a mortgagor was receiving the rents for the mortgagee.

That is one of those cases, which have led me to doubt, [* 253] whether Lord MANSFIELD was not sometimes applying, * as the doctrine of a Court of equity, what never had been so.

In the instance of a bill filed to put a term out of the way, which may be represented as in the nature of an equitable ejectment, the Court will in some cases give an account of the past rents: but a mortgagee never can in this Court make the mortgagor account for the rents for the time past. There is not an instance, that a mortgagee has *per directum* called upon the mortgagor to account for the rents. The consequence is, that the mortgagor does not receive the rents for the mortgagee.

The petition was dismissed.

ENGLISH NOTES.

The earliest reported case which laid down the above rule is *Colman v. Duke of St. Albans* (1796), 3 Ves. 25, where it appeared that the office of Registrar of the Court of Chancery had been granted for lives to the Duke who mortgaged the fees thereof, but remained in receipt of the profits till only one life survived; the security having then become insufficient the plaintiff filed his bill for an account of past fees received by the mortgagor, but a demurrer was allowed. So also, a mortgagee cannot call for an account of rents and profits from a trustee in whom the equity of redemption is vested for the benefit of the mortgagor, or from the mortgagor's trustee in bankruptcy. *Hele v. Lord Bealey* (1855), 20 Beav. 127; *Flight v. Camac* (1856), 25 L. J. Ch. 654, 4 W. R. 654. The rule applies not only to a mortgagee in fee or for lives, but also to a mortgage of a term even though it has expired and so destroyed the security. *Gresley v. Adderley* (1818), 1 Swanst. 573, 18 R. R. 146. See *Earl of Clarendon v. Barham* (1842), 1 Y. & C. C. C. 688. So a mortgagee of a tenant for life to whom a rent charge has been granted by way of security, is not entitled to be paid the arrears of the rent charge, on the apportioned rent for the period from the preceding quarter day to the death of the tenant for life. *Re Marquis of Anglesey Estate, Paget v. Anglesey* (1874), L. R. 17 Eq. 283, 43 L. J. Ch. 437, 29 L. T. 721, 22 W. R. 507; *Yorkshire Banking Co. v. Mullan* (1887), 35 Ch. D. 125, 56 L. J. Ch. 562, 56 L. T. 399, 35 W. R. 593.

After a decree for sale of a bankrupt's equity of redemption subject to a legal mortgage, the trustee in the bankruptcy is entitled to the rents and profits until the sale, unless in the meantime the mortgagee takes possession: *Ex parte Living, Re Tombs* (1835), 2 Mont. & Ayr. 223; but an equitable mortgagee is entitled to the rents from the date of the order: *Ex parte Bignold* (1834), 2 M. & A. 16, 4 Dea. & Chit. 259.

On the principle of the above rule, a mortgage of a farm and farming stock will not prevent the mortgagor from selling the stock in the ordinary course of business without accounting for the proceeds.

No. 43. — *Eyre v. Hughes.* — Rule.

National Mercantile Bank v. Hampson (1880), 5 Q. B. D. 177, 49 L. J. Q. B. 480, 28 W. R. 424. And a mortgagee until he takes possession is not entitled to growing crops removed by the mortgagor between the time of demand and entry. *Ex parte Temple* (1822), 1 Gl. & J. 216; *Ex parte National Mercantile Bank, Re Phillips* (C. A. 1880), 16 Ch. D. 104, 50 L. J. Ch. 231, 44 L. T. 265, 29 W. R. 277.

So long as the mortgagee of a ship does not take possession, the mortgagor, as registered owner of the ship subject to the mortgage, retains all the rights and powers of ownership, and his contracts with regard to the ship are valid and effectual and bind the mortgagee, provided that the mortgagee's security is not thereby materially prejudiced. *Keith v. Burrows* (H. L. 1877), 2 App. Cas. 636, 46 L. J. C. P. 801, 37 L. T. 291, 25 W. R. 831.

AMERICAN NOTES.

Principal case cited in 1 Jones on Mortgages, sect. 667, with *Wilder v. Houghton*, 1 Pickering (Mass.), 87; *White v. Wear*, 4 Missouri Appeals, 341; *Silverman v. N. W. Mut. Ins. Co.*, 5 Bradwell (Illinois Appeals), 124; *Kountze v. Hotel Co.*, 107 United States, 378; *Scott v. Ware*, 65 Alabama, 174; *Wooten v. Bellinger*, 17 Florida, 289; *Mississippi Valley, &c. Ry. Co. v. U. S. Express Co.*, 81 Illinois, 534; *Woodley v. Holt*, 14 Bush (Kentucky), 788; *Noyes v. Rich*, 52 Maine, 115; *Chelton v. Green*, 65 Maryland, 272; *Wathen v. Glass*, 54 Mississippi, 382; *Morse v. Whitcher*, 64 New Hampshire, 590; *Leeds v. Gifford*, 41 New Jersey Eq. 464; *Reeder v. Dargan*, 15 South Carolina, 175; *Frierson v. Blanton*, 1 Baxter (Tennessee), 272; *Johnson v. Lasker R. E. Ass'n*, 2 C. A. Texas, 494; *Childs v. Hurd*, 32 West Virginia, 66; *Clarke v. Curtis*, 1 Grattan (Virginia), 289; *McKircher v. Hawley*, 16 Johnson (N. Y.), 289; *Tilden v. Greenwood*, 149 Mass. 567; *Teal v. Walker*, 111 United States, 242 (citing the principal case); *Hardin v. Hardin*, 34 South Carolina, 77; 27 Am. St. Rep. 786; *Argall v. Pitts*, 78 New York, 239; *Jacob v. Gibson*, 9 Nebraska, 380; *Fontaine v. Schulenberg, &c. L. Co.*, 109 Missouri, 55; 32 Am. St. Rep. 648; *Renard v. Brown*, 7 Nebraska, 449. All our cases sustain the doctrine of the rule.

No. 43. — EYRE v. HUGHES.

(1876.)

RULE.

A MORTGAGEE is not allowed to charge any commission or remuneration for his personal trouble, even though a stipulation is inserted in the mortgage deed purporting to authorise him to make such a charge.

Eyre v. Hughes.

2 Ch. D. 148-164 (s. c. 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597).

Mortgage. — Mortgagee in Possession. — Solicitor. — Account. — Wilful Default. — Allowances. — Commission on Receipt of Rents. [148]

Stipulations for commission on receipt of rents and conversion of arrears of interest into principal inserted by a solicitor mortgagee in a mortgage deed prepared by himself, and insisted upon by him as the condition of any further advance to his client, will not be allowed in taking the account between the solicitor, as mortgagee in possession, and his client in a foreclosure suit.

Upon a proper case for opening signed accounts made by a mortgagor by his answer and evidence in a foreclosure suit in issue before the 2nd of November, 1875, the Court has power, under the Judicature Act, 1873, s. 24 (2, 3), to entertain this equitable defence in the same manner as if a cross bill, or, under the new procedure, a counter claim, had been filed for the purpose.

Form of the account directed in such a case.

This was a mortgagee's suit, praying an account and payment of what was due for principal and interest on certain indentures of mortgage and transfer of leasehold premises at Hackney (the plaintiff submitting to account for all moneys received by him, and to account as mortgagee in possession of the mortgaged premises, without prejudice to the provisions contained in an indenture of the 28th of February, 1871, for his protection and benefit, or to his rights in respect thereof), and of what was due to the plaintiff for purchase-money, commission, interest, costs, and charges in respect of his purchase of the reversion of the leaseholds; the plaintiff submitting to account for the rents received by him since he had had possession thereof; and in default of payment, praying a foreclosure of the equity of redemption in the mortgaged premises and of all right to the benefit of the purchase by the plaintiff of the freehold and reversion of the leasehold premises.

The defendant submitted that the accounts ought to be taken against the plaintiff as mortgagee in possession on the footing of wilful default; that no commission or other profit or benefit attempted by him to be stipulated for in addition to his principal, * interest, and costs, ought to be allowed to the [*149] plaintiff in taking the account; and that all sums claimed by him in respect of costs ought to be taxed, and in all cases where he had acted as his own solicitor, costs out of pocket only ought to be allowed.

No. 43. — Eyre v. Hughes, 2 Ch. D. 149, 150.

The mortgage transactions in respect of which the bill was filed arose out of advances which were made from time to time by the plaintiff, a solicitor, and Pinniger, his cashier, to enable the defendant Hughes to carry on certain building operations at Hackney, under an agreement for a building lease to be granted to him on advantageous terms by the ground landlord, Mr. Tyssen Amhurst. The agreement for a lease was in March, 1867, and shortly afterwards Hughes was introduced to Pinniger, who undertook to furnish the necessary capital at 10 per cent until the leases were granted, and 6 per cent afterwards, upon the security of the building agreement and of the premises therein comprised. In September, 1867, William Thomas, who was father-in-law of Hughes and a client of the plaintiff, was induced by Pinniger, with the sanction of the plaintiff, who really advanced the moneys, using the name of Pinniger in the transaction, to join Hughes in an arrangement for building and completing the houses as a joint speculation, in which they were to be assisted with capital provided by the plaintiff and Pinniger.

In October, 1867, three of the intended houses having been covered in, a lease of them was granted to Hughes by Mr. Tyssen Amhurst, and Hughes assigned his interest in the property to Thomas and himself.

On the 13th of December, 1867, Hughes executed a mortgage of three houses to secure £1004 17s. 2d. and an arrear of interest recited to be then owing to Pinniger. On the same day an agreement in the form of a letter signed by Hughes and Thomas was entered into, by which, in consideration of the reduction of the rate of interest to 6 per cent, it was agreed that Pinniger (whose name was used for the plaintiff) and Thomas should each take three-eighths of the profits of the building speculation, and Hughes two-eighths. Hughes and Thomas stated that they considered these terms very onerous, but as they were under the necessity of applying to the plaintiff for further advances, and he and Pinniger promised in return to "finance" the building throughout, [* 150] they * were compelled to submit. Further advances were made from time to time, and in March, 1869, a loan of £2000 from a Mrs. Bailey was negotiated by the plaintiff for Hughes and Thomas. This money was received by the plaintiff, and they were credited with the amount in reduction of the plaintiff's bill of costs and interest, and a portion of the principal

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on the securities. At this time, after giving them credit for Mrs. Bailey's £2000, a sum of £3130 18s. was stated to be still owing to the plaintiff and Pinniger, and further advances were required by Hughes and Thomas for completing the houses already built and erecting the others contracted to be built. Accounts showing this amount of £3130 to be due were produced by Pinniger under the plaintiff's direction, and submitted to the defendants for their signature. The defendants, under pressure, as they alleged, and as the only means of obtaining from the plaintiff any further advance, signed the accounts. At this time Thomas was also entitled, under certain building leases for ninety-nine years, to property at Brompton, subject to mortgages which he had created. In February, 1871, and for some time previously, the plaintiff had been in receipt of the rents of the Brompton property as mortgagee in possession. In addition to the advances made by the plaintiff in the name of Pinniger, he had been in the habit of making advances to Thomas to enable him to carry on his building business. According to the statement in the bill these advances were usually made upon bills of exchange drawn by Hughes and accepted by Thomas, and the bills were discounted by the plaintiff at the rate of 1s. in the pound commission on bills having three months to run. In some cases Thomas signed an I. O. U. for the amount, and sometimes no security was given; but generally a letter or memorandum was given in addition, agreeing to charge the interests of Thomas and Hughes in the Brompton and Hackney properties, and to execute a legal mortgage when required. And while such advances were in the course of being made it was agreed in writing that all the advances made, or which should afterwards be made, by the plaintiff to Thomas should be charged upon their interests in the above-named properties. Thomas and Hughes being in many instances unable to meet the bills at maturity, the "plaintiff, at considerable inconvenience, was obliged to provide for payment of them, and, with the consent of Thomas and Hughes, *he charged a further commission of [* 151] 5 per cent for so doing." In February, 1871, the plaintiff had thus advanced to Thomas £4624 7s. 3d., and requested him and Hughes to execute to him a legal mortgage according to their agreement, interest at 7 per cent, reducible on punctual payment to 6 per cent.

Before the mortgages of February, 1871, were executed, an

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account of the advances was prepared by the plaintiff, which, after giving credit for all moneys received on behalf of William Thomas, and charging him with the advances, interest, and commission, and also with a bill of costs for professional services of £57 17s. 3d., showed the amount due to the plaintiff to be £4521 6s. The bill alleged — but this was denied by the defendants — that the account was fully examined and investigated by Hughes and Thomas, and full explanations given to them respecting the same before they executed the mortgages of February, 1871; and as the plaintiff distinctly refused to advance more money unless the deeds were executed by Hughes and Thomas, they ultimately agreed to execute, and did execute, the mortgages. It was at the same time agreed that the mortgage deeds should contain special provisions to protect the plaintiff from liability to account for the rents received by him and in respect of the management of the property as mortgagee in possession, further than as agent for the mortgagors respectively, and to empower him to receive for his own use a commission upon the rents as a remuneration for his trouble in receiving them. Under the pressure alleged to have been put upon them by the plaintiff, and without being able to help themselves, Hughes and Thomas ultimately agreed to the insertion of these stipulations in the mortgage deeds, which were prepared by the plaintiff and tendered to them for execution.

By these deeds the respective interests of Hughes and Thomas in the Hackney and Brompton property were charged with the £4521 6s. shown by the accounts furnished to be due from them, with interest at 7 per cent, reducible to 6 per cent on punctual payment. Provisions were contained that the plaintiff should enter into possession of the mortgaged premises, and out of the rents and profits should, 1, pay the costs of management; 2, retain a commission of 5 per cent per annum on the gross receipts as [* 152] a * remuneration for his trouble in collecting and receiving the rents; 3, retain the interest payable under the mortgage deed. If the rents and profits should prove insufficient for these payments, the plaintiff might apply them in payment of interest in arrear, and pay the costs of management and outgoings, or so much as the rents should be insufficient to pay, out of his own moneys, and add the amount so paid and the unsatisfied commission to the principal, bearing interest accordingly. Subject as

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aforesaid, the rents and profits were to be applied in satisfaction of the principal owing on these indentures, or any of the prior encumbrances. And no further liability than that of an agent was to be imposed upon the plaintiff with regard to the collection of the rents or the management of the property.

It appeared that, in order to protect the Hackney property from forfeiture on account of breaches of covenant which had been committed under the building leases, negotiations were entered into by the plaintiff, on behalf of the defendants, with the lessor with a view to purchasing the reversion. It was arranged that the plaintiff should advance the money and complete the purchase in his own name, and give the defendants the benefit thereof on having the purchase-money secured by a mortgage in fee of the reversion. Accordingly, in June, 1873, the reversion was purchased by the plaintiff, who claimed to add to the purchase-money his costs of investigating the title and professional charges relating thereto.

In the meantime Thomas had filed a liquidation petition; and on the 26th of February, 1872, the defendant Alfred Rosling was, by resolution of the creditors, appointed trustee under the liquidation. Some further advances were made to Hughes by the plaintiff upon the usual terms, and the balance ultimately claimed by the plaintiff at the time of filing the bill in July, 1874, was £9073 12s.

Some correspondence had taken place with a view to settling the balance claimed to be due upon the several mortgages, and in the course of the correspondence some errors in the accounts were admitted on behalf of the plaintiff, and offered to be rectified.

The defendants Hughes and Rosling (as liquidator of Thomas) did not dispute the execution of the mortgage deeds, but submitted * that in any case the account ought to be taken [* 153] against the plaintiff as against a mortgagee in possession; and that, under the circumstances of pressure, want of opportunity for examining the accounts, and having regard to the position of the plaintiff as mortgagee and also their solicitor, they were entitled to re-open the signed accounts, and to have the bills of costs which were included in the securities taxed; and also that the plaintiff ought to be disallowed all sums charged by him under the provisions of the mortgage deeds, February, 1871, for commis-

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sion on account of the rents, for interest on arrears, and for management of the estate.

The effect of the evidence, which was voluminous and conflicting, is stated in the judgment.

Fry, Q. C., and Millar, for the plaintiff:—

1. The question is, whether the accounts in this foreclosure suit are to be taken on the usual footing, or whether the defendants, who have not filed a cross bill, are entitled upon averments in their answers of error, pressure, and something amounting to fraud, to open signed accounts as if there had been a cross bill. It is the clearly established rule that no such relief can be obtained by a defendant without filing a cross bill for the purpose: *Richards v. Bagly*, 1 J. & Lat. 120; and since the Judicature Act, 1873, although an actual cross bill is no longer necessary, this equitable defence, the benefit of which is introduced into the Common Law as well as the Chancery Divisions of the High Court, must be distinctly raised by counter-claim, which has been substituted for the proceeding by a cross bill: s. 24, sub-s. 2; Rules of Court, 1875, Order xix., r. 3.

2. Upon the merits, the defendants have not alleged, still less proved, any case sufficient, even if they had filed a cross bill or counter-claim, for opening these accounts. There is nothing special in these agreements entered into between the plaintiff and Hughes and Thomas to enable them to carry out their building speculations. They were under no pressure beyond what was, from the nature of their trade and position, put by Hughes and [* 154] Thomas* upon themselves. They might have obtained any information as to, and had full opportunity of investigating, the accounts before signing them; and the evidence shows that Hughes at least was not a person likely to be subjected to pressure. In order to open a settled account there must be specific averment and specific evidence of overcharges so gross as to amount to fraud, and the relation of solicitor and client is not enough to induce the Court to open the account upon a mere general averment, without proof of fraud, or specific averment and specific proof of overcharge amounting to fraud: *Blagrace v. Routh*, 2 K. & J. 509, 8 D. M. & G. 620.

3. As to the footing on which the account is to be taken as against the plaintiff, his possession under the deeds of February, 1871, was that of agent or bailiff for the purpose of receiving the

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rents and managing the property, and not that of mortgagee in possession; and, accordingly, since that date he cannot be charged with what he might have received but for his wilful default: *Lord Kensington v. Boncerie*, 7 D. M. & G. 134; and the account must be limited to rents and profits actually received. It will be suggested that the stipulations for the plaintiff's benefit contained in the deeds of February, 1871, cannot be supported, and in aid of that contention this passage from *Fisher's Mortgages*, Vol. ii. p. 890, may be cited: "The mortgagee may agree with the mortgagor for the appointment of a receiver, to be paid by the latter, or may appoint one under the statute (24 & 25 Vict., c. 124); but neither the mortgagee, nor his assignees or executors, nor a trustee for the mortgagor's creditors, can have any allowance for personal care or trouble in receiving the rents of the estate, notwithstanding an agreement with the mortgagor for that purpose, even where before the existence of the present statutory power he might have appointed a receiver." But when the cases cited in support of this proposition, *Bonithon v. Hockmore*, 1 Vern. 316; *French v. Baron*, 2 Atk. 120; *Godfrey v. Watson*, 3 Atk. 517; *Chambers v. Goldwin*, 9 Ves. 254; *Nicholson v. Tutin*, 3 K. & J. 159, are examined, it will be found that the only authority against perfect freedom of contract between *mortgagor [*155] and mortgagee consists of certain *dicta* of Lord HARDWICKE (2 Atk. 120, 3 Atk. 517), an expression of opinion in 1 Vern. p. 316, and what is said by Lord ELDON in *Chambers v. Goldwin*, 9 Ves. 271: "There is nothing unfair, or perhaps illegal, in taking a covenant originally, that if interest is not paid at the end of the year it shall be converted into principal. But this Court will not permit that, as tending to usury, though it is not usury. So a mortgagee cannot stipulate to be receiver of the rents and profits with a commission. . . . But it has been long determined here that, though a mortgagee may stipulate for a receiver to be paid by the mortgagor, and may appoint a bailiff, &c., he cannot himself stipulate for any advantage beyond the interest; and though it seems to make little difference to the mortgagor, who is receiver, yet this Court considers it as tending to usury and oppression, and a collateral advantage, which a man contracting for a loan of money shall not make."

But now that the usury laws have been swept away these observations have lost their force, and the mortgagee may make such

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stipulations as he pleases for remunerating himself for the trouble of collecting the rents and managing of the estate. We submit, therefore, both upon the question of pleading and upon the merits, that the accounts which have been signed cannot be re-opened, and that the plaintiff is entitled to the ordinary foreclosure decree.

Kay, Q. C., and Bury, for the defendants Hughes and Rosling: —

Upon the question of pleading: Under the new procedure a cross bill has been rendered unnecessary, and is now an improper proceeding: Judicature Act, 1873, s. 24, sub-s. 3, Rules of Court, 1875, Order xix., r. 3; and the power given to all Divisions of the High Court to entertain this species of equitable defence, and, if necessary, to amend the pleadings for that purpose, applies equally to cases in which issue has been joined before the 2nd of November, 1875: *King v. Corke*, 1 Ch. D. 57. On the pleadings,

the defendants' counter-claim, or case for equitable relief, [* 156] is sufficiently * raised to enable the Court to make a complete decree. But if not, then, under the large and benign jurisdiction given by Order xxvii., r. 1, the Court has power to allow the pleadings to be amended at any stage, even at the hearing. *King v. Corke*, 1 Ch. D. 57.

Upon the merits: Having regard to the helpless position of Hughes and Thomas, needy builders, without independent advice, and completely in the power of the plaintiff, who as their solicitor was bound to have protected their interests; having regard also to pressure exercised by him to compel them, as the only means of obtaining any further advance, to sign without investigation the accounts submitted to them, and having regard to the exorbitant rate of interest charged thereon, it is impossible that the accounts signed by them under these circumstances can be treated as settled or binding. Then the provisions that in case of any arrear (not of interest but of commission, for which the mortgagee was not entitled to stipulate) the arrears were to be turned into principal, bearing interest at the same heavy rate, are most exorbitant and oppressive, and cannot be sustained. The rule that a mortgagee in possession, who is in respect of the rents and profits a trustee for the mortgagor of any surplus, cannot, any more than a trustee, make any profit out of the trust, or charge any remuneration for his trouble, *Matthison v. Clarke*, 3 Drew. 3; *Barrett v. Hartley*, L. R. 2 Eq. 789; *Nicholson v. Tatin*, 3 K. & J. 159, is quite

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independent of usury or tendency to usury, and rests on the principle that the allowance of such charges "would open the door to imposition and even oppression." *Leith v. Irvine*, 1 My. & K. 277. He is entitled to his principal, interest, and costs only, and not to any commission, nor to any allowance for services or loss of time. *Bertrand v. Davies*, 31 Beav. 429.

As this rule, that a person under colour of a mortgage cannot obtain a distinct collateral advantage, has not been rested entirely upon the ground of usury, the principle of the cases is not affected by the repeal of the Usury Laws under 31 Vict., c. 4: *Broad v. Selfe*, 9 Jur. (N. S.) 885; and in any case the jurisdiction of the Court to prevent any oppressive bargain, or any advantage exacted from * a man under grievous necessity and want [* 157] of money from prevailing against him, remains unaffected: *Barrett v. Hartley*, L. R. 2 Eq. 789; *Croft v. Graham*, 2 D. J. & S. 155; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484.

There being in this case the relation of solicitor and client as well as that of mortgagor and mortgagee, the ordinary rule that some specific error must be charged in the pleadings and proved at the hearing to entitle the party to surcharge and falsify, does not apply, and upon a mere general allegation that the accounts are erroneous the accounts will be opened if sufficient cause be otherwise shown. *Lawless v. Mansfield*, 1 D. & War. 557; *Davis v. Parry*, 1 Giff. 174; *Morgan v. Higgins*, 1 Giff. 270, correcting upon this point the observations of Vice-Chancellor Wood in *Blagrave v. Routh*, 2 K. & J. 509.

Upon the whole case, we submit that the plaintiff is not entitled to have the account taken in this foreclosure suit except on the terms of having the accounts of the whole of the transactions between himself and the defendants re-opened, and that it is open to the defendants to obtain this relief both under the old and the new practice, without being compelled to file a cross bill.

Fry, in reply.

BACON, V. C.:—

The most, or perhaps not the least, important part of this case raises a point which must be decided under the recent Judicature Act, viz., the argument that the defendant's case cannot be entertained in this Court because he has not filed a cross bill, or something in the nature of a cross bill. Now the statute is plain. Sect. 24, sub-s. 2, is as follows: [His Lordship read the section.]

Nothing could be more comprehensive, general, and universal than that stipulation. It shall be the duty of the Court, in deciding a cause between two parties litigant, or more than two parties, if a ground of defence or title to relieve by way of defence is alleged by the defendant, to deal with it in the same manner as the Court of

Chancery would have dealt with it. But it is said that the [*158] *Court of Chancery would not have dealt with this unless

there had been a cross bill filed. The subsequent provisions, which point out the way in which a defendant having a title to relief may bring that forward by way of counter-claim and so on, need not be further referred to; but it becomes necessary to examine the pleadings of the cause to see whether, in the terms of the sub-section, there is such a defence or such a title to relief by way of defence upon the record as compels the Court to deal with it upon the principles familiar in this Court. The defendants, who were builders, first Hughes alone, and afterwards Hughes and Thomas, engaged together in building speculations, and the result of their first introduction was that Pinniger, having lent some of his own money and some of the plaintiff's money, lent more, and from time to time mortgages were executed. Beyond question the relation of solicitor and client existed between the plaintiff and Hughes and Thomas, if not from the beginning, at least early, or near enough to the beginning, so as to influence the whole of these transactions.

Mortgages were executed; more money was wanted; more money was raised by mortgage, not to the plaintiff, but the plaintiff, as he says in his bill, received the proceeds of that mortgage money. I speak of the mortgage to Mrs. Bailey. The bill alleges that the £2000 has been applied by the plaintiff in the payment off, so far as it would go, of the moneys due to the plaintiff in respect of his bills of costs and the principal and interest on the aforesaid securities. Without deeming it necessary for this purpose to enumerate them all, there were several other mortgages of the like kind, upon which the plaintiff says in the same terms he received the mortgage money, carried it into his account, and applied it in the same manner as I have first mentioned. In fact the phrase is repeated. So that, not only the relation of solicitor and client existed between these parties, but a sort of relation something like that of a banker. The plaintiff received the moneys resulting from the defendant's mortgage, carried them into account, and applied

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them in payment of the moneys he had advanced and of his bills of costs. That pervades the whole of this transaction, and the relationship is never in any degree changed.

* Now, without putting upon the plaintiff because he is [* 159] a solicitor any further burden than properly belongs to any person who so acted, I cannot forget that he had the duties of a solicitor to discharge to those persons. It was his duty to advise them, and it was his duty, and no doubt he discharged it punctually, to see that if they executed mortgages to other persons they did not enter into any other engagement than the transaction warranted. The mortgages to other persons were all at the rate of 5 per cent; the mortgages to the plaintiff were taken at a larger rate of interest, which he had by law a perfect right to exact and take; and his position as solicitor did not interfere with that right in the slightest degree, but that was the fact.

The mortgages go on, accounts are stated which are of this nature. The plaintiff by his cashier makes out his accounts, Hughes and Thomas are summoned to examine those accounts; the accounts are laid before them or submitted to them (a variety of expressions are used in the evidence); and ultimately, at the instance of the agent of the plaintiff, and at his request, Hughes and Thomas signed memorandums approving of those accounts, and stating that they had examined them. If that was all in the case, no doubt they would be bound by a settled account, just as anybody else who having had a full opportunity of examining an account affixes his name to a memorandum, signifying that he has examined and approved of it, is bound. But I do not find a statement in any part of this evidence that there was any examination of the account further than that the defendant's approbation was required to the statement of moneys which had been advanced to him. I do not find any allusion of any sort to bills of costs. There are bills of costs amounting, as the defendant's accountant says — and without adopting it any more than is necessary for this purpose, I must for the present assume it to be right — to £600 odd, of which no bill was ever delivered, as far as I know. Nobody has ever said that there was, and there was no examination of those bills. Without insisting too strictly upon what may be called the duty of the solicitor, was not it right that before these defendants should have been called upon to approve of, or before they were in a situation to examine these accounts, they should

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have had the bills delivered to them? There is no pretence [*160] for saying * that they were ever delivered, and the plaintiff

himself says—and this is what the defendants say was pressure—he says over and over again, that he refused to advance any more money unless they would execute the securities which were tendered to them, the approval of the accounts being a preliminary to the execution of these deeds. That I take to be the clear condition of the case as far as the transactions between the plaintiff and defendants were concerned, and that continued down to the execution of the last of the mortgages. Well, then, that being so, I say it was fair, just, and proper that the bills should be delivered, and that the cashier, or the other persons who prepared the accounts and asked the approval of them, ought in his evidence to have said that that which was represented by bills of costs was drawn to the attention of the defendants, and if it was not, I am compelled to say that I think the plaintiff in that instance did not perform properly the duty he had taken upon himself as solicitor of the defendants. It cannot, I think, be fairly or properly suggested that these bills are not subject to taxation. If subject to taxation, and anything should be reduced from them, it would be apparent that there was an error in the accounts stated. Some errors are admitted, and there is an offer to rectify those errors. But surely, as between these parties, considering their relations, considering the burden upon the one and the duty which was upon the other, it is not unreasonable to say that, although no doubt a large sum of money is due to the plaintiff in respect of large advances made by him for the benefit of the defendants, the way in which that amount is to be ascertained, notwithstanding the execution of the deed under the circumstances in evidence, is still open to investigation. That is all that I understand the defendants ask upon this occasion. They do not dispute the execution of the mortgage deed; they do not dispute the fact of the advances being made; but they say that, on considering the matter, or upon inquiry further into it, they are satisfied that they do not owe him so much as the mortgage deed represents them to be in his debt. But then, is there any principle upon which I can say that such allegation is not a sufficient title to relief in this Court? In the words of the Act, is there any necessity, or would there have been any necessity, for a cross bill; The mortgages are not disputed, but the [*161] only thing that is disputed * is the sum mentioned in the

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mortgage deed as the debt, and for that the defendants allege such reasons as appear in their answer why they ought to be reconsidered, and why the account ought to be investigated. I should be very reluctant to resort only to my experience, but I think that upon such a statement the Court would unhesitatingly direct the account to be taken. A defendant would not be precluded from at least an inquiry into that which he said was his just right. Upon the statute, therefore, I am satisfied that I should neglect my duty if I did not attend to that which is alleged by the defendants by way of defence for the purposes I have mentioned. There is no statement of fraud, no statement of forgery as to the deed, and no reason why the deed should be set aside, and no claim for that to be done. All that the defendants say is, there are errors in the accounts upon which we signed these deeds, and we desire to have them set right. The plaintiff, to a certain extent, agrees that there are errors in the accounts, and he does not dispute, as far as I know, that no bill of costs was ever delivered to these parties during the transactions which occupied the few years covered by these several deeds. I think, therefore, that upon the pleadings, notwithstanding the argument that the Court does not give relief except upon a cross bill, that if there had been no Judicature Act the defendants, upon the evidence before me, would have been entitled to have the inquiry which they ask for. Under the Judicature Act I have no choice but to say that they are so entitled, and that the account must be taken. Then as to the manner in which the account is to be taken. Much has been said about that stipulation in the last mortgage deed which constitutes the plaintiff receiver of the rents, and allows him to charge a commission for that purpose. It was truly said that the older decisions on the subject had in view the Usury Laws, and Lord ELDON's expression in *Chambers v. Goldwin*, 9 Ves. 271, is that such a stipulation would tend to usury, but he says also that it would be oppressive. If the Court finds from the relation of the parties that one of them has the means of oppressing the other, it would come clearly within the very expression that he uses. It is very true, as has been most ably argued, that if you treat the mortgagee in possession as a trustee, he has a right to stipulate * for any remuneration that he and the other [* 162] party may agree upon; so to call him a trustee does not preclude the case. That is not all that has to be considered.

Nobody has ever said in express terms that a mortgagee in possession is a trustee; but everybody knows that the ground upon which a mortgagee in possession is charged with the rents which, but for his wilful default, he might have received, is because he has changed his character of mere mortgagee, and has chosen for the time being to become owner.

Referring, then, to the topic which I have before mentioned, viz., the relation of solicitor and client, I must assume that the plaintiff took upon himself, in this matter of contract, the duty of advising his clients what deeds they should execute. If an independent solicitor had been employed, he would at once have objected to any such stipulation — at least he ought to have done so. And he might have referred to that universal practice among conveyancers in mortgage transactions who, when it is desired to give the mortgagee a power, or at least a control over the receipt of the rents, so deal with the matter as to prevent the mortgagee bargaining for himself for any advantage to be derived. That is carefully prevented by appointing some other person to be receiver, and providing for the remuneration to be paid to that other person; all of which is consistent with the other principles recognised in similar cases, where the mortgagee entering into possession cannot receive the rents with his own hands, and finds it necessary to employ a man for that purpose. That expenditure is allowed in the taking of the account, but that is only allowed because the mortgagee himself derives no personal benefit from that transaction. And when the enormous power which a mortgagee in possession possesses over the mortgaged property is considered, the rule, I think, is founded in perfect justice and good sense, and being, as I have said, universally well known, the stipulation that these defendants should be burdened with the commission payable to the plaintiff for his own benefit is one which ought not to have been inserted in the mortgage deed. And as the plaintiff has never been, at least until the quarrel happened, other than the solicitor and adviser of the defendants, and ought to have advised them against any such stipulation, unless there was the clearest evidence that the defendants, knowing what protection [* 163] * the law gave them, were willing to relinquish that protection, I think the plaintiff cannot justify that charge. Then, as to the practice which seems to have prevailed, and is stated by the plaintiff himself in his bill, of charging a very large

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rate of interest upon the sums which he from time to time advanced. Now, the Usury Laws having been repealed, it is not to be disputed that it was competent for the plaintiff to demand and exact, and competent for the defendants to agree, that he should have any rate of interest that he thought fit, but I do not find any such contract in the bill. It is stated that the plaintiff made advances to Thomas upon bills of exchange "which were brought by Thomas to be discounted at the rate of 1s. in the pound commission on bills having three months to run." This statement leaves it doubtful whether this large rate of discount was proposed by the plaintiff or by Thomas. After describing the other transactions connected with this discounting, the effect of which is that an equitable mortgage or charge was at the same time as the discounting created in favour of the plaintiff, he says further, that being obliged to provide for payment of the bills, he, "with the consent of Thomas and Hughes, charged a further commission of 5 per cent for so doing." I cannot read any authority in that for the charge by the plaintiff of that rate. It seems that the accounts when produced were disputed by the defendants. The conveyancing clerk, Mr. Hatton, tells them they must settle that with the plaintiff. They do see the plaintiff, and then the plaintiff says that he positively refused to advance any further sum of money unless they would execute the deed, and under these circumstances they did execute the deed. The answer alleges the pressure which I have been mentioning, and that the accounts are erroneous, and it concludes with a passage which has been somewhat canvassed, but which I take to mean that the account shall be taken of what is due to the plaintiff for principal and interest, that is, for principal moneys advanced, and interest upon such advances, with such costs and charges as shall upon taxation appear to be due, but not interest upon those costs.

I think that there is a sufficient ground of defence, a sufficient title to relief pleaded upon this record. I think I am bound upon the evidence to give effect to that claim; I think that there must * be an account properly taken of the moneys [* 164] advanced by the plaintiff with interest. I think that the costs which are inserted in the account, and included in the securities, must now be taxed, and that the amount when taxed must be included in the plaintiff's securities, and there must be a

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decree of foreclosure for the amount of what, upon this process being gone through, shall appear to be due. In other respects it will be an ordinary foreclosure account.

After some further discussion, in the course of which *Sandon v. Hooper*, 6 Beav. 246, was cited, on the question of an allowance for repairs executed by plaintiff as mortgagee in possession, the decree was made in the following terms:—

1. Account of principal and interest due to plaintiff in respect of his advances on the mortgages in the pleadings mentioned, and for his costs of suit, such costs, and also his costs properly incurred in respect of the mortgages, to be taxed.

2. Account of money laid out by plaintiff in necessary repairs on the mortgaged property, with interest on the sums so laid out at same rate as in the mortgages, adding the amount to Account 1.

3. Account, on the footing of wilful default, of rents and profits received, deducting the amount, with interest at 4 per cent from the date of receipt, from Accounts 1 and 2.

4. Account of money expended in purchase of the reversion, and in taking the said account, signed accounts not to be deemed settled accounts. Usual foreclosure decree.

ENGLISH NOTES.

The rule is well settled that a mortgagee in possession is not entitled to charge the mortgagor with any commission or remuneration for personal trouble in collecting rents &c., whether any fiduciary relation exists between the parties or not. *Bonithon v. Hockmore* (1682), 1 Vern. 316; *French v. Baron* (1740), 2 Atk. 120; see *Chambers v. Goldwin* (1804), 5 Ves. 839, 9 Ves. 254, 7 R. R. 181; *Union Bank of London v. Ingram* (1880), 16 Ch. D. 53, 50 L. J. Ch. 74, 43 L. T. 659, 29 W. R. 209.

The rule which prohibits payments or allowances to a mortgagee by way of remuneration for personal trouble is not affected by the repeal of the Usury Laws, but is still strictly adhered to in order to prevent oppressive bargains. *Croft v. Graham* (1849), 2 De G. & S. 155, 161; *James v. Kerr* (1889), 40 Ch. D. 449, 459, 58 L. J. Ch. 355, 60 L. T. 212, 37 W. R. 279; *Mainland v. Upjohn* (1889), 41 Ch. D. 126, 138, 58 L. J. Ch. 361, 60 L. T. 614, 37 W. R. 411.

On this principle a mortgagee having an express agreement or a statutory power to appoint a receiver will not be allowed any remuneration if he is himself appointed, and he will be liable to account as mortgagee in possession. *French v. Baron* (1740), 2 Atk. 120; *Scott*

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v. Brest (1788), 2 T. R. 238. See *Nicholson v. Tutin* (1856), 3 K. & J. 159.

But a mortgagee in possession may, if the collection of the rents be troublesome, appoint an agent or bailiff to collect them at the expense of the mortgagor. *Godfrey v. Watson* (1747), 3 Atk. 517; *Davis v. Dendy* (1818), 3 Madd. 170, 18 R. R. 209.

An improper allowance of remuneration or commission to a mortgagee is a ground to surcharge and falsify. *Langstaffe v. Fenwick* (1805), 10 Ves. 405, 8 R. R. 8.

AMERICAN NOTES.

This doctrine finds support in *Elmer v. Loper*, 25 New Jersey Eq. 475; *Moore v. Cable*, 1 Johnson Chancery (N. Y.), 388; *Allen v. Robbins*, 7 Rhode Island, 33; *Turner v. Johnson*, 95 Missouri, 431; 6 Am. St. Rep. 62; *Benham v. Rowe*, 2 California, 387; 56 Am. Rep. Dec. 342; *Snow v. Warwick Inst. for Sav.*, 17 Rhode Island, 66; *Breckenridge v. Brooks*, 2 A. K. Marshall (Kentucky), 335; 12 Am. Dec. 401.

But where the mortgagee employs an agent to superintend, lease, collect rents, &c., he is entitled to his reasonable expenses of such agency. *Turner v. Johnson*, *supra*; *Allen v. Robbins*, *supra*; *Harper v. Ely*, 70 Illinois, 581.

In *Moore v. Cable*, *supra*, KENT, Chancellor, said: "The next question is whether the defendant, standing in the place of the mortgagee, can be allowed for what the case states as improvements in clearing part of the land. Such an allowance appears to me to be unprecedented in the books, and it cannot be admitted consistently with established principles. The defendant was in this case a volunteer. Instead of calling upon the debtor or foreclosing the mortgage, he elected to enter upon uncultivated lands, and to execute acts of ownership by clearing a part. To make the allowance would be compelling the owner to have his lands cleared and to pay for clearing them, whether he consented to it or not. The precedent would be liable to abuse, and would be increasing difficulties in the way of the right of redemption. Many a debtor may be able to redeem by refunding the debt and interest, but might not be able to redeem under the charge of paying for the beneficial improvements which the mortgagee had been able and willing to make. The English Courts have always looked with jealousy at the demands of the mortgagee, beyond the payment of his debt."

In Maine, a mortgagee in possession is allowed a commission for collecting rents, as compensation for his care of the property, and this although it was stipulated that he might deduct from the rents any commissions that he might have paid for collecting them, and it appeared that he paid nothing, but collected them himself. *Bradley v. Merrill*, 91 Maine, 340. So in Massachusetts. *Gerrish v. Black*, 104 Mass. 400; and Connecticut; *Waterman v. Curtis*, 26 Conn. 241.

Mr. Jones says (2 Mortgages, sect. 1132): "In the early cases a mortgagee in possession was regarded as a trustee, who was not then entitled to commissions. This rule has been changed as regards trustees, and there is no reason

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why it should be retained as regards mortgagees in possession. The tendency in recent cases is evidently in the direction of a change in the rule." Citing *Green v. Lamb*, 24 Hun. (N. J. Sup. Ct.), 87, holding that there is no fixed rule on the subject, and the allowance is discretionary.

In *Gibson v. Crehore*, 5 Pickering (Mass.), 160, the Court said: "With regard to the defendant's claim of compensation for his care and trouble in superintending the estate and receiving the rents, it seems to us reasonable; and we know of no good reason why it should be disallowed. In England such an allowance is never made, unless where a bailiff has been employed. But the reason for adopting the rule there, as I understand it, does not apply here. In England a trustee is never allowed any pecuniary compensation for his services in discharging the duties of his trust. And a mortgagee (as before foreclosure he holds the estate in trust for the mortgagor, if he chooses to redeem) falls within the scope of that ancient rule. *Bonithon v. Hockmore*. 1 Vern. 316. I am aware that other reasons have been thrown out, but they appear to have little weight in them; and the true reason of the rule, as I take it, is the one assigned. In this Commonwealth the English rule in regard to trustees has never been adopted; on the contrary, claims of executors and other trustees under wills for compensation for their services in the trust, have been always allowed; and similar allowances have been made in Virginia, Pennsylvania, and other States. In New York, where the English practice has always been so closely followed, the English rule has been adopted. *Green v. Winter*, 1 Johnson's Chancery Reports, 27; *Manning v. Manning*, *ibid.* 527; *Wilson v. Wilson*, 3 Binney, 557; 4 Hening & Munford's Virginia Reports, 415; *Granberry's Executor v. Granberry*, 1 Washington (U. S. Circ. Ct.), 246." But in *Eaton v. Sainonds*, 14 Pickering, 98, commissions were denied to the mortgagee who occupied the premises in person.

In *Waterman v. Cartis*, *supra*, the Court said: "The plaintiff in error objects to the allowance, by the Superior Court, to the defendants, for their personal services in leasing and collecting the rents of the mortgaged property. Under the rule adopted by the English Courts, founded partly on convenience but mainly on policy, and to which they tenaciously adhere, that no compensation for personal services shall be allowed to trustees, and which they apply not only to those who are strictly such, but to all persons acting in a fiduciary capacity, such as executors, administrators, receivers, committees on the estates of lunatics, and mortgagees, that item would undoubtedly be rejected. But a reference to the decisions of the Courts in this country will show that they have generally taken a different view of this subject, and allow to trustees and these kinds of agents, not only expenditures properly made by them, but a reasonable compensation for their personal services. We are not aware that the general question of this latter allowance, independently of any previous agreement between them and those interested in his acts, has come before our Courts; but it has, for at least a very considerable period, been the practice of our tribunals to make such allowance, and, so far as we know, without objection. We think that it ought not to be disturbed. The justice of such a compensation is obvious, and it is by no means clear that its allowance would not generally promote, rather than prevent, a faithful discharge of the duties of such agents."

No. 44. — *Moss v. Gallimore.* — Rule.

On the other hand, in *Allen v. Robbins*, *supra*, (A. D. 1861), the Court refused the mortgagee commissions or fees for his own services, observing: “Though in this country the rule has been very much relaxed; and by force of statutes in some States, and by decisions of their Courts in others, allowances of this kind have been made to executors, administrators, guardians, and to trustees properly such, it seems to have been adhered to with great strictness in relation to mortgagees: and this because to the fiduciary relation existing between mortgagor and mortgagee is superadded that of debtor and creditor. The defendant Robbins, though he held the mortgage in trust for the holders of the bills of exchange secured by it, and was to them as a trustee in the strictness of that term, yet as to the owner of the equity of redemption, and in so far as he held the estate as security for the debts, he held the relation of mortgagee only; standing precisely in the condition of the holders of those debts, whose trustee he is. He is entitled therefore to claim neither more nor less than he would be if he himself were holder for the security of his own debt; or than the holders of these drafts would be entitled to claim, had the mortgage been made directly to them. The rule would exclude both him and them from compensation for services, as against the owner of the equity.” But the same Court, in *Lime Rock Bank v. Phetteplace*, 8 Rhode Island, 56, where there was a stipulation in the mortgage for commissions to the mortgagee on sale of the premises, allowed them.

SECTION VI. — *Remedies of the Mortgagee.*No. 44. — *MOSS v. GALLIMORE.*

(K. B. 1779.)

RULE.

A MORTGAGEE as between himself and the mortgagor is entitled, if the mortgage deed contains a proviso for quiet enjoyment, as soon as any default is made in payment of principal or interest, or if there be no such proviso, then upon or at any time after the execution of the mortgage, to enter into possession of the land, or if the land be in lease or in the occupation of tenants, to give them notice to pay the rents to him, and to receive the rents accordingly.

 No. 44. — Moss v. Gallimore, Doug. 279.

Moss v. Gallimore and another.

Douglas, 279-283.

Mortgagee. — Right to receive Rents after Notice. — Or to Distrain.

[279] A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease prior to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to what accrues afterwards, and he may distrain for it after such notice. In a notice for the sale of a distress under 2 W. & M. c. 5, it is not necessary to mention when the rent became due for which the distress was made.

In an action of trespass, which was tried before NARES, Justice, at the last assizes for Staffordshire, on not guilty pleaded, a verdict was found for the plaintiff, subject to the opinion of the Court, on a case reserved. The case stated as follows: One Harrison, being seised in fee, on the 1st of January, 1772, demised certain premises to the plaintiff for twenty years, at the rent of £40, payable yearly on the 12th of May; and, in May, 1772, he mortgaged the same premises, in fee, to the defendant Mrs. Gallimore. Moss continued in possession from the date of the lease, and paid his rent regularly to the mortgagor, all but £28 which was due on and before the month of November, 1778, when the mortgagor became a bankrupt, being, at the time, indebted to the mortgagee in more than that sum for interest on the mortgage. On the 3rd of January, 1779, one Harwar went to the plaintiff, on behalf of Gallimore, showed him the mortgage deed, and demanded from him the rent then remaining unpaid. This was the first demand that Gallimore made of the rent. The plaintiff told Harwar that the assignees of Harrison had demanded it before, viz., on the 31st of December; but, when Harwar said that Gallimore would distrain for it if it was not paid, he said he had some cattle to sell, and hoped she would not distrain till they were sold, when he would pay it. The plaintiff not having paid according to this undertaking, the other defendant, by order of Gallimore, entered, and distrained for the rent, and thereupon gave a written notice of such distress to the plaintiff, in the following words: "Take notice, that I have this day seized and distrained, &c. by virtue of an authority, &c. for the sum of £28, being rent, and arrears of rent, due to the said Ester Gallimore, at Michaelmas last past, for, &c. and unless you pay the said rent, &c." He

accordingly sold cattle and goods to the amount of £22 2s. — The question stated for the opinion of the Court was, Whether, under all the circumstances, the distress could be justified.

Wood, for the plaintiff. Bower, for the defendants.

Wood. — The plaintiff's case rests upon two grounds: 1. The defendant Gallimore not being, at the time when the rent distrained for became due, in the actual seisin of the premi- [280] ses, nor in the receipt of the rents and profits, she had no right to distrain. 2. The notice was irregular, being for rent due at Michaelmas, whereas this rent was only due, and payable in May. — 1. Before the Statute of 4 Anne, c. 16. s. 9, a conveyance by the reversioner was void without the attornment of the tenant, (Co. Litt. 309, a, b,) which was necessary to supply the place of livery of seisin. Since that statute I admit that attornment is no longer necessary to give effect to the deed; but it does not follow from thence that a grantee has now a right to distrain, before he turns his title into actual possession. The mortgagor (according to a late case, *Keech v. Hall*, No. 19, p. 123, *ante*) is tenant at will to the mortgagee, and has a right to the rents and profits due before his will is determined. Nothing, in this case, can amount to a determination of the will, before the demand of the rent on behalf of the mortgagee, and the whole of that for which the distress was made became due before the demand. If the mortgagor himself had been in possession, he could not have been turned out by force; the mortgagee must have brought an ejectment. The assignees had called upon the plaintiff for the rent, as well as Gallimore, and how could he take upon himself to decide between them? The mortgagee should have brought an ejectment, when any objection there might have been to the title could have been discussed. It does not appear from the case that the interest in arrear had ever been demanded of the mortgagor, and there is a tacit agreement that the mortgagor shall continue in possession and receive the rents till default is made in paying the interest. — 2. The notice is irregular, and, on that account, the distress cannot be justified. By the common law, the goods could not be sold. The power to sell was introduced by the Statute of William and Mary, (2 W. & M. sess. 1, c. 5, s. 2,) but it is thereby required that notice shall be given thereof, "with the cause of taking," &c. These requisites are in the nature of conditions precedent, and, if not complied with, the proceedings are illegal.

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It is true, this irregularity, since the Statute of 11 Geo. II. c. 19, s. 19, does not make the defendants trespassors *ab initio*, but the action of trespass is still left by that statute, for special damages incurred in consequence of the irregularity.

Lord MANSFIELD observed, that the plaintiff was precluded, [281] by the case, from going for special damages arising from any supposed irregularity in the sale, no such special damages being found, and the question stated being only, whether the distress was justifiable; and BULLER, Justice, said, that it was not necessary by the Statute of William & Mary, to set forth, in the notice, at what time the rent became due.

Bower. — If the law of attornment remained still the same as it was at common law, the conversation stated to have taken place between the plaintiff and Harwar would amount to an attornment; and, when there has been an attornment, its operation is not restrained to the time when it was made: it relates back to the time of the conveyance, and makes part of the same title; like a feoffment and livery, or a fine or recovery and the deed declaring the uses. *Long v. Heming*, 1 Anders. 256; s. c. Cro. El. 209. Now, however, any doubts there might have been on this subject are entirely removed by the Statute of Queen Anne, the words of which are very explicit, viz., 4 Anne, c. 16, s. 9, "that all grants or conveyances of any manors, rents, reversions, or remainders, shall be as good and effectual to all intents and purposes, without any attornment of the tenants, as if their attornment had been had and made." The proviso in the same statute (s. 10), which says that the tenant shall not be prejudiced by the payment of any rent to the grantor before he shall have received notice of the grant, shows that it was meant that all the rent which had not been paid at the time of the notice should be payable to the grantee. The mortgagor is called a tenant at will to the mortgagee. That may be true in some respects, but it is more correct to consider him as acting for the mortgagee in the receipt of the rents as a trustee, subject to have his authority for that purpose put an end to at whatever time the mortgagee pleases. It is said, the proper method for the mortgagee to have followed would have been to have brought an ejectment, but it is only a very late practice to allow a mortgagee to get into the possession of the rents, by an ejectment against a tenant under a lease prior to the mortgage. The interest, it is said, is not stated to have been demanded,

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but the case states that, at the time of the notice and distress, more than the amount of the rent in arrear was due. It is said, the tenant could not decide between the mortgagor (or, which is the same thing, his assignees) and the mortgagee; but that is no excuse. He would have had the same difficulty in the case of an absolute sale; a mortgage in fee being, at law, a complete sale, and only differing from it in respect of the equity of redemption, which is a mere equitable interest.

The Court told him it was unnecessary for him to say anything on the other point.

LORD MANSFIELD. — I think this case, in its consequences, very material. It is the case of lands let for years and afterwards mortgaged, and considerable doubts, in such cases, have arisen in respect to the mortgagee, when the tenant colludes with the mortgagor; for, the lease protecting the possession of such a tenant, he cannot be turned out by the mortgagee. Of late years the Courts have gone so far as to permit the mortgagee to proceed by ejectment, if he has given notice to the tenant that he does not intend to disturb his possession, but only requires the rent to be paid to him, and not to the mortgagor. This however is entangled with difficulties. The question here is, whether the mortgagee was or was not entitled to the rent in arrear. Before the statute of Queen Anne, attornment was necessary, on the principle of notice to the tenant; but, when it took place, it certainly had relation back to the grant, and like other relative acts, they were to be taken together. Thus livery of seisin, though made afterwards, relates to the time of the feoffment. Since the statute, the conveyance is complete without attornment, but there is a provision that the tenant shall not be prejudiced for any act done by him, as holding under the grantor, till he has had notice of the deed. Therefore the payment of rent before such notice is good. With this protection he is to be considered, by force of the statute, as having attorned at the time of the execution of the grant; and here the tenant has suffered no injury. No rent has been demanded which was paid before he knew of the mortgage. He had the rent in question still in his hands, and was bound to pay it according to the legal title. But having notice from the assignees, and also from the mortgagee, he dares to prefer the former, or keeps both parties at arm's length. In the case of execution it is uniformly held, that if you act after notice, you do it at your

peril. He did not offer to pay one of the parties on receiving an indemnity. As between the assignees and the mortgagee, let us see who is entitled to the rent. The assignees stand exactly in the place of the bankrupt. Now, a mortgagor is not properly tenant at will to the mortgagee, for he is not to pay him [283] rent. He is so only *quodam modo*. Nothing is more apt to confound than a simile. When the Court, or counsel, call a mortgagor a tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases. He has the legal title to the rent, and the tenant, in the present case, cannot be damaged, for the mortgagor can never oblige him to pay over again the rent which has been levied by this distress. I therefore think the distress well justified; and I consider this remedy as a very proper additional advantage to mortgagees, to prevent collusion between the tenant and the mortgagor.

ASHHURST, Justice. — The Statute of Queen Anne has rendered attornment unnecessary in all cases, and the only question here arises upon the circumstance of the notice of the mortgage not having been given till after the rent distrained for became due. Where the mortgagor is himself the occupier of the estate, he may be considered as tenant at will; but he cannot be so considered, if there is an under-tenant; for there can be no such thing as an under-tenant to a tenant at will. The demise itself would amount to a determination of the will. There being in this case a tenant in possession, the mortgagor is, therefore, only a receiver of the rent for the mortgagee, who may, at any time, countermand the implied authority, by giving notice not to pay the rent to him any longer.

BULLER, Justice. — There is in this case a plea of the general issue, which is given by statute; but if the justification appeared upon the record in a special plea, the distress must be held to be legal. Before the Act of Queen Anne, in a special justification, attornment must have been pleaded. But since that statute, it is never averred in a declaration in covenant, nor pleaded in an avowry. In the case of *Keech v. Hall*, referred to by Mr. Wood, the Court did not consider the mortgagee as tenant at will to all purposes. If my memory do not fail me, my Lord distinguished mortgagors from tenants at will in a very material circumstance,

namely, that a mortgagor would not be entitled to emblements. Expressions used in particular cases are to be understood with relation to the subject-matter then before the Court.

The *postea* to be delivered to the defendants.

ENGLISH NOTES.

If the mortgage deed contains a proviso for quiet enjoyment until default, the mortgagee will be liable in damages if he enters before default. *Moore v. Shelley* (P. C. 1883), 8 App. Cas. 285, 52 L. J. C. P. 35, 48 L. T. 918.

The proviso operates as a re-demise to the mortgagor, and constitutes him a tenant of the mortgagee until the time fixed for payment of the mortgage moneys. *Wilkinson v. Hall* (1837), 3 Bing. (N. C.) 508. See *Keech v. Hall*, No. 19, p. 123, *ante*.

Such provisos are now generally omitted, so that a legal mortgagee can enter into possession whenever he thinks fit so to do. And for that purpose the mortgagor is a mere tenant at will. *Doe v. Maisey* (1828), 8 B. & C. 767, 32 R. R. 548. The Court will not interfere to prevent a mortgagee from lawfully exercising his right to enter into possession. *Williams v. Medlicott* (1819), 6 Price, 495. But the entry will entitle the mortgagor to redeem at once without notice or in lieu of notice. *Bovill v. Endle*, 1896, 1 Ch. 648, 65 L. J. Ch. 542, 44 W. R. 523.

The right to enter into possession can only be exercised by a mortgagee in whom the legal estate is vested; for that right can be enforced only by means of an action for the recovery of the land which is now substituted for the old common law action of ejectment.

An equitable mortgagee has no means of impounding the rents and profits except by appointment of a receiver, which can only be made if a prior mortgagee is not in possession. But a puisne mortgagee may require the prior mortgagee to pay the rents and profits to him instead of to the mortgagor. *Parker v. Calcraft* (1821), 6 Madd. 11. See as to registered charges under the Land Transfer Act 1875 (38 & 39 Vict., c. 87), s. 25 of that Act.

A mortgagee cannot enter into possession after a receiver has been appointed by the Court on the application of a subsequent mortgagee, unless his right so to do is reserved by the order: he must obtain the removal of the receiver, or the leave of the Court to bring an action for the recovery of the land. *Angel v. Smith* (1804), 9 Ves. 335, 7 R. R. 214. *Langton v. Langton* (1855), 7 De G. M. & G. 30. See Kerr on Receivers, 3rd ed. p. 139.

A mortgagee having entered into possession is entitled to the growing

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crops or emblements, for all the produce of the land forms part of his security. *Keech v. Hall*, No. 19, p. 123, *ante*: *Moore v. Shelley*, *supra*: see *Doe v. Maisey* (1828), 8 B. & C. 767, 32 R. R. 548. And he may restrain the mortgagor from removing the crops by injunction. *Baggall v. Villar* (1879), 12 Ch. D. 812, 48 L. J. Ch. 695, 28 W. R. 242. A mortgagee in possession of trade premises may carry on the business so as to sell the mortgaged property as a going concern. *Cook v. Thomas* (1876), 24 W. R. 427. See as to obtaining a transfer of the license of a public house, *Rutter v. Daniel* (1882), 30 W. R. 724, 801. As to a mortgagee's right to cut timber, see the Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c. 41), s. 19 (IV.).

A mortgagee in possession may apply the rents and profits not only in keeping down interest, but in reduction of principal. *Lord Kensington v. Bouverie* (1855), 7 De G. M. & G. 134. But he is not bound to do so. *Berney v. Sewell* (1820), 1 Jac. & Walk. 647, 21 R. R. 265. If, however, the mortgagee retains the surplus rents and profits after keeping down the interest, instead of paying them to the mortgagor, and if such surplus rents are of large amount and no interest is in arrear, the Court may direct the accounts to be taken with rests, that is to say, that yearly or half-yearly balances be struck, and that the surplus rents and profits as appearing by each balance be applied in reduction of principal. See *Thorneycroft v. Crockett* (H. L. 1848), 2 H. L. Cas. 239.

A mortgagee cannot be compelled to enter into possession, but if he does so he must apply the rents and profits as the Court would apply them. *Bulstrode v. Bradley* (1747), 3 Atk. 582.

A mortgagee who has taken possession cannot relinquish possession at his pleasure; and the Court will not as a general rule assist him to do so by appointing a receiver. *Re Prytherch, Prytherch v. Williams* (1889), 42 Ch. D. 590, 38 W. R. 61.

AMERICAN NOTES.

Principal case cited in 1 Jones on Mortgages, sect. 774: "a recognized principle ever since:" "it is an established rule that a mortgage of premises already leased is an assignment of the reversion. It is an established rule that the mortgagee, upon giving notice to a tenant of the mortgaged premises under a lease for years given prior to the mortgage, is entitled to all rent accruing and becoming due subsequent to the execution of the mortgage, as well that in arrear at the time of giving notice as that which accrues afterwards." "No actual entry is necessary." *Teal v. Walker*, 111 United States, 242; *Burden v. Thayer*, 3 Metcalf (Mass.), 76; 37 Am. Dec. 117 (citing the principal case); *Kimball v. Lockwood*, 6 Rhode Island, 138; *King v. Housatonic R. Co.*, 45 Connecticut, 226 (citing the principal case); *Tubb v. Fort*, 58 Ala-

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bama, 277; *Kimball v. Pike*, 18 New Hampshire, 419 (citing the principal case); 4 Kent Com., p. 165, citing the principal case, with the remark: "though it would seem to be now understood in chancery, that the mortgagor is not accountable as receiver for the rents, and that the rent due prior to the notice belongs to the mortgagor" (citing *Ex parte Wilson*, ante, p. 382). "But the case of *Moss v. Gallimore* has been considered as good law, to the whole extent of it, by the Courts of law in this country" (citing *Soulders v. Van Sickle*, 3 Halsted [New Jersey], 313; *M'Kircher v. Hawley*, 16 Johnson [N. Y.], 289), "and the distinction taken is between a lease made by the mortgagor prior, and one made subsequent to the mortgage."

The principal case is said, in *Soulders v. Van Sickle*, supra, to have been decided "on satisfactory principles," but the distinction is drawn as to a subsequent lease. See *Sanderson v. Price*, 1 Zabriskie (New Jersey), 637, 646, citing the principal case.

In *Teal v. Walker*, supra, the Court said: "The case of *Moss v. Gallimore* has never been held to apply to a mortgagor or the vendee of his right of redemption," and the same distinction is drawn, citing *Mayo v. Shattuck*, 14 Pickering (Mass.), 533.

Rent accrued prior to the mortgage belongs to the mortgagor. *King v. Housatonic R. Co.*, supra; *Burden v. Thayer*, supra.

No. 45. — PARKINSON v. HANBURY.

(H. L. 1867.)

RULE.

A MORTGAGEE who enters as such into possession or receipt of the rents and profits of the mortgaged property must account not only for what he has actually received, but for what he might have received but for his wilful default; but if a mortgagee enters into possession or receipt of rents and profits in another character, he cannot be made liable as a mortgagee in possession.

Parkinson v. Hanbury and others.

L. R. 2 H. L. 1-20 (s. c. 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642).

Mortgagee. — Accounts. — Purchaser. — Pleading. — Practice. [1]

A mortgagee who takes possession of the mortgaged estate is, on a bill for redemption, bound to render an account of rents and profits received, and is also liable for all which he might have received but for his wilful default; but where persons, who though in fact mortgagees, enter into possession of the rents and

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profits in another character, they cannot be subjected to that special liability. Their receipt of the rents and profits in the particular character of mortgagees in possession must be distinctly established.

Where a plaintiff seeks to open a settled account, there must be in the bill a distinct statement of specific errors in the account.

A person who, under a mortgagee, becomes possessed of a property, supposing himself to be its purchaser, if it afterwards appears that he is not validly clothed with that character, but only holds a lien on the property in virtue of the money advanced by him on the supposed purchase, cannot, therefore, be so treated as to make him liable to render accounts as an ordinary mortgagee in possession. It is essential to the creation of such a liability that he should have known he was in possession as mortgagee.

This was an appeal against a decree of the Court of Chancery, originally pronounced by Vice-Chancellor KINDERSLEY (1 Drew. & Sm. 143), and then affirmed by the Lords Justices (2 De G. J. & Sm. 450).

[* 2] * The appellant was the daughter and administratrix of John Farrell Parkinson, deceased. The respondents constituted the firm of Hanbury, Buxton, & Co. Parkinson was possessed, under leases for various terms, of a public house called the Royal Oak, situate at the corner of Galway and Waterloo streets, in the parish of St. Luke (where he then carried on the business of a publican), of eight houses in Radnor Street and Waterloo Street, of three houses in Galway Street, and of a timber yard and small tenement at the corner of Bowling Green Lane, and a piece of land in the latter place, in the parish of Clerkenwell.

On the 26th of May, 1823, Parkinson mortgaged to Thomas Chambers, to secure repayment of a sum of £2000, the term, wanting seven days, of his interest in the Royal Oak and the eight houses in Galway and Waterloo streets. The mortgage contained a power of sale upon three months' notice given to Parkinson, or his representatives.

Hanbury & Co. had at various times lent money to Parkinson, who was in that way indebted to them in a sum of £735. This debt was secured to them by two promissory notes. On the 10th of January, 1828, Parkinson assigned to Thomas Butts Aveling (who represented Hanbury & Co.) the remainder of the term of his lease of the Royal Oak, upon trust, that in case default should be made in the payment of the sum of £735, Aveling should have the absolute power to sell the premises by public auction, or private contract, or otherwise, and to pay the £735 and interest, and the

money due on the mortgage of 1823, and in case of there being a surplus, to pay the same to Parkinson, his heirs, executors, &c.

In May, 1828, by an arrangement between Thomas Chambers and Hanbury & Co., the latter, as Chambers' receivers, entered into the receipts of the rents and profits of the property mortgaged to Chambers, who gave to the tenants of the houses an authority to pay the rents to them. This arrangement was consented to by Parkinson, whose circumstances were at that time very embarrassed. He signed a memorandum to Hanbury & Co. in these terms: "I authorize you, or your agents, to collect the rents of the five houses in Radnor Street and the three houses in Waterloo Street, and also the rent of the timber yard situate in Bowling Green Lane, and to pay thereout (as far as the same may extend) the several ground *rents for the said premises, and the [* 3] public house called the Royal Oak, and also in discharge of the principal and interest that may become due on the mortgage existing on the said property, and keeping the said premises in necessary repair, and in other outgoings, I having this day quitted possession of the same to you, and generally to act in the management of the estate as to you shall be deemed expedient, and for so doing this shall be your sufficient authority." Parkinson died intestate in October, 1831. On the 7th of June, 1834, Hanbury & Co. delivered up the possession of the premises, which up to that time they had held under these documents, and rendered accounts of the income and outgoings. The appellant made some objections to some of these accounts; answers were sent to her objections and she made no observation in reply. What occurred between the date of June, 1834, and the 9th of October following, did not clearly appear in evidence. On the 9th of October, 1834, the executors of Chambers, under the power of sale contained in the mortgage to him, sold the property to Hanbury & Co. for the sum of £1300, a sale which was afterwards declared to be invalid, because it was effected without the three months' notice required by the power of sale contained in the mortgage.

After the execution of the deed of sale, Hanbury & Co. received, on the 29th of November, 1834, the half-year's rent due at Midsummer, and on the 10th of February, 1835, the rent due at Michaelmas, 1834, but in what character did not distinctly appear. At this period, and for some time afterwards, there was no legal personal representative of Parkinson. In February, 1845, the

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appellant took out letters of administration to her father, and in 1848 she filed her bill, alleging (but without specifying items) that the accounts rendered were erroneous, that the respondents had not rendered accounts of the good will and profits of the business of the Royal Oak, and praying that the respondents (whom she treated as mortgagees in possession) should render in that character accounts of what they had received, or what, but for their wilful default, they might have received. In 1852, she filed a similar bill, and in 1854, on her own application, the bill of 1848, which the respondents had duly answered, was dismissed.

The bill filed in 1852 (amended in August, 1858, and re-
[*4] amended in December, 1858) prayed for an account of * what was due to the respondents on their security of January, 1828, or otherwise charged upon the mortgaged premises in the bill mentioned, that they might be decreed to account for the profits of the Royal Oak, and of the goodwill of the business thereof, received by them, or their agents, or which, without their wilful neglect or default, might have been received by them, from June, 1828, up to the filing of the bill: and that they might account for the rents and profits of the houses in Radnor Street and Waterloo Street up to the time when the same were taken possession of by Chambers, or to such farther time as the Court might deem fit; also of the timber yard and tenements adjoining, and of the houses in Galway Street and the ground in Coppice Row. And that it might be declared that, notwithstanding the conveyance and assignment of the Royal Oak by Chambers to the respondents, they were trustees or mortgagees thereof — and that the appellant was entitled to redeem the same, and all the other premises then in the possession of the respondents — and for the usual orders thereon, and for farther relief.

The respondents put in their answers, affirming the correctness of the accounts delivered, alleging that they had collected the rents in the character of agents, and denying that they ever had received, or been entitled to receive, anything for the goodwill and profits of the business. The cause came to issue, evidence was taken, and it was heard before Vice-Chancellor KINDERSLEY, who, on the 7th of June, 1860, made his decree, by which the bill was ordered to be dismissed with costs; as to the relief sought to be obtained thereby in respect of all property in the pleadings mentioned, except the Royal Oak, as to which it was ordered that

an account should be taken of what was due in respect of the security of January, 1828, or otherwise charged upon the mortgaged premises, and for the costs of the suit; and that an account be taken of rents and profits received by the respondents from the 1st of June, 1828, to the present time; and that, upon the appellant paying to the respondents the principal, interest, and costs, after such deductions, and giving credit to them for £1300 and interest from the 9th of October, 1834, they should re-convey, &c. But in default of her making such payment the bill was to be dismissed with costs.

* On appeal to the Lords Justices, they, on the 15th of [* 5] January, 1865, affirmed this decree with costs.

This appeal was then brought.

Mr. J. George N. Darby, for the appellant:—

The respondents were mortgagees of the Royal Oak, under the security of January, 1828, and possession under it would impose on them the liability to account as ordinary mortgagees in possession. They could not refer their possession to the memorandum given by Parkinson, and treat themselves as agents only. Even if they could do so till Parkinson's death, they ceased after that period to hold, except in the character of mortgagees, or if, between October, 1831, and June, 1834, they acted as the agents of Chambers, they gave up that character in June, 1834. Since the purchase from Chambers (which was invalid, and gave no title as a purchase), they must be treated as having held in the character of mortgagees in possession. They were, in fact, mortgagees, and the rents which became due before the contract of purchase could only have been received by them in that character. They had no title to receive those rents in any other. If so, then the account directed should have been not merely of the rents and profits of the Royal Oak actually received, but also such as might have been received but for their wilful default. The case of *Chambers v. Goldwin*, 5 Ves. 834, is in point. In that case there was a conveyance, as if in trust, of a West India estate, which, like the assignment of the reversion here, was, in fact, a mortgage, and was so treated by the Court. The assignee, therefore, was held liable to account as a mortgagee in possession, and, though he had settled accounts with the executors of the mortgagor in the character of trustee or agent, the Court treated those accounts as not finally settled, and, on a bill filed by the daughter of the mortgagor, she was held

entitled to require accounts as between mortgagor and mortgagee, and to surcharge and falsify the accounts already settled with the executors.

The appellant has sufficiently alleged errors in these accounts. She has claimed to have accounts of the money obtained for the goodwill of the Royal Oak, and from the profits of the [* 6] business, * which she alleges to have been under the control of the respondents. She is, therefore, entitled to have the accounts opened.

[At the close of the first day's hearing the appellant claimed to address the House, but was informed that that was not to be permitted, as she had already been heard by her learned counsel, who had very ably conducted her case. On the following morning]

Mr. Glasse, Q. C., and Mr. E. K. Kay, Q. C., addressed the House for the respondents. They contended that the respondents had never held the character of mortgagees in possession, but had either acted as agents for Chambers, with the assent of Parkinson himself, or had borne the character of purchasers for value. They referred to *Lord Trimleston v. Hamill*, 1 Ball & B. 383, where Lord Chancellor MANNERS distinguished between a mortgagee in possession and a mere trustee or agent, on the ground that the former never, and the latter always, rendered annual accounts, and held that the accepting of such annual accounts fixed the party accepting them as having treated the party rendering them as trustee or agent, and not as mortgagee. There the case of *Chambers v. Goldwin* was referred to, and held to be inapplicable, because there (as here) the facts showed that the possession was that of a trustee or agent, and not of a mortgagee.

The appellant in person again attempted to address the House, but was not permitted to do so. She was, however, permitted to mention the case of *Neesom v. Clarkson*, 2 Hare, 163 (see, upon constructive notice, the subsequent case of *Hevitt v. Loosemore*, 9 Hare, 449), where the purchaser of an estate was held to have had the means of being cognizant of the real title to the estate, and, that title being defective, he was treated as having acted with notice, and the Court would not make presumptions in his favour merely because he was a purchaser.

The LORD CHANCELLOR (Lord CHELMSFORD):—

My Lords, although at the close of the case on the part of

the * appellant I entertained a very strong opinion that she [* 7] had wholly failed in laying any foundation for her appeal, yet I do not regret that under the peculiar circumstances of the case, your Lordships thought proper to hear the counsel for the respondents, in order that the case might be thoroughly investigated before your Lordships came to a final decision. I feel bound to repeat what I said in the course of the discussion, that the appellant's case was most clearly and ably conducted by Mr. Darby, who brought forward every point that could possibly be urged in support of the appeal.

[His Lordship stated the nature of the suit, and the prayer of the bill.]

The appellant is the administratrix of her father, John Farrell Parkinson, who died on the 6th of October, 1831. He was the lessee of the Royal Oak public house, under a lease for a term of fifty-three years, from the 29th of September, 1819. On the 26th of May, 1823, he mortgaged the Royal Oak and the eight houses in Radnor Street to a person of the name of Thomas Chambers, for a sum of £2000, and that mortgage deed contained a power of sale, which was to be exercised by Chambers on giving three months' notice to the mortgagor, his executors, or administrators. On the 10th of January, 1828, the Royal Oak was assigned by Parkinson to Thomas Butts Aveling for the defendants, Truman, Hanbury, & Co., as the security for a sum of £735, and interest, due to them. That deed contained a proviso for redemption, and was clearly a second mortgage of this property. There was a trust conferred upon Aveling to sell or to let the premises, and out of the proceeds of the sale to pay the mortgage to Chambers of £2000, to pay a sum of £735 and interest to the defendants, and to pay the surplus, if any, to the estate of Parkinson.

In the month of May, 1828, Parkinson was embarrassed, and in difficulties, and unable to carry on the Royal Oak public house, and he agreed, on receiving a sum of £50, to give possession of the house and other properties which he possessed to the defendants, who were to act as his agents, to collect the rents, and to let the properties, and he signed a memorandum, which is in these terms (see p. 413, *ante*).

At the same time, the receiver of Chambers, the mortgagee, also * signed an authority to Aveling for the defendants, to [* 8] act as his receivers, in these terms: "Messrs. Hanbury & Co.

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having been authorized by Mr. Parkinson, as well as by myself, as the receiver, to enter upon Mr. Parkinson's houses, receive the rents, and manage, paying the rents, and keeping down the incumbrances, &c., you are required to pay your future rents (until a countermand of this notice) to Messrs. Hanbury & Co., instead of me, or any person claiming on behalf of Thomas Chambers, Esq. — Dated this 6th of June, 1828."

Hanbury & Co. continued to act under this memorandum until the 7th of June, 1834, when they delivered up possession.

[His Lordship here stated the circumstances of the sale by Chambers to the respondents, and the declaration of its invalidity for the want of notice to any representative of Parkinson, the fact that accounts had from time to time been delivered by the respondents, and the institution of the suit of 1848, and its dismissal; the institution of this suit, and the decree therein. He then proceeded thus:]

It is against this decree that the present appeal has been brought, and the reasons given for the appeal are: First. "Because by the amended bill of complaint the appellant set out specific charges as being erroneous, and is, therefore, entitled to open such account, even if it was ever closed or settled, and thus obtain an account of the rents received for and in respect of the premises in the first portion of the decree mentioned;" and, Second. "Because the respondents are mortgagees in possession of the said Royal Oak public house, and liable to account as such, and not, as in the decree mentioned, to the appellant as administratrix of the said John Farrell Parkinson, deceased, for the rents and profits of the same, and are, whether in possession as mortgagees, trustees, or agents, liable to account for the profits and proceeds of the business of the said public house."

I will take the second reason of the appeal first. It is very clear that in the peculiar case of a mortgagee who chooses to assert his rights by taking possession of the mortgaged estate, and who is not bound to render any account to the mortgagor, if the mortgagor sues for a redemption of the property, the mortgagee who has so taken possession is bound to account, not only for the [* 9] rents *and profits which he has received, but also for everything which he might have received but for his own wilful default. That, I believe, is the only instance in which a person in possession of an estate, who is called upon to account, is made

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answerable for that which he might have received but for his wilful default. Therefore it was necessary, in order to lay the foundation for this appeal, to show that the defendants were actually in possession, and in receipt of the rents and profits as mortgagees. Now it appears to me that the appellant has entirely failed in establishing this case.

Under the memorandum of the 10th of May, 1828, the defendants were in receipt of the rents and profits, as the agents of Parkinson, and they continued in possession in that character down to the 7th of June, 1834. On the 9th of October, 1834, they came into possession under a different character, as vendees, upon the sale by the executors of Chambers. They received the rents down to the 7th of June, 1834; but, in addition to this, it appears by the accounts that they received the Midsummer rent for 1834, and the Michaelmas rent for 1834, being the rents for a period between their delivering up possession, which they held as the agents of Parkinson, and the time of their becoming vendees under the purchase from Chambers' executors, on the 9th of October, 1834. Now that sale having been held to be invalid, it is contended on the part of the appellant that these rents, having been received without any right under the memorandum of agency, or any right under the purchase from Chambers, that therefore the only title which the defendants can pretend to for the receipt of these rents must be in their character of mortgagees. But, in the first place, these rents were received, not during the interval between June, 1834, and October, 1834, but the Midsummer rent was received on the 29th of November, 1834; that is, after the purchase from Chambers' executors, and the Michaelmas rent was received on the 10th of February, 1835. How is it possible to say that, under these circumstances, the defendants ought to be charged in respect of the receipt of these rents as mortgagees, and that, in that character, the appellant is entitled to have a decree against them for an account?

It may be, my Lords, that they were not entitled to receive * those rents at all, that is putting it in the most [* 10] unfavourable way for the defendants. It may be that they were entitled, under the contract of sale with Chambers' executors, to those rents, although the purchase deed was not executed until after those rents became due. It may be that they considered that they were entitled to those rents under the purchase deed

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as back rents. But it is perfectly clear that they never assumed to receive those rents as mortgagees, and, therefore, if it is only where a mortgagee asserts his strong right by entering into possession and receiving the rents and profits, that, when he is called on to account, he has to account not only for what he has received, but also for that which he might have received but for his own wilful default; that principle cannot certainly apply to this case.

My Lords, it appears to me to be impossible to put the case in the way in which it was ingeniously put by Mr. Darby, that the sale by Chambers' executors having been decreed to be invalid, there was no other title on which the defendants could possibly be in possession except that of being mortgagees, and that, therefore, retrospectively, it must be considered that their possession must be applied to that title as mortgagees, and to no other. I apprehend that it is perfectly clear that that cannot be maintained.

And, My Lords, just consider for one moment the situation of this case with regard to the proceedings which have been stated to us. In the proceedings on the bill of 1848 precisely the same accounts as those which are now in question were produced to the Court and were examined; and in those accounts, of course, there were those two items in respect of the Midsummer and the Michaelmas rents of 1834. The appellant had an opportunity at that time of questioning the title or the right under which the defendants received those rents; and these accounts were at that time considered to be perfectly satisfactory, and, upon her own application afterwards, her bill was dismissed. My Lords, I think it is impossible, under these circumstances, it being necessary for the appellant to satisfy your Lordships that the defendants were in possession and in receipt of these rents as mortgagees, that your Lordships can come to the conclusion that she has established any case to that extent. And, therefore, my Lords, as far [* 11] as that question * goes, I apprehend that the decree of the VICE-CHANCELLOR is perfectly correct.

My Lords, I have very few words indeed to say to your Lordships as to the other ground of the appeal, which is, that by her bill of complaint the appellant sets out specific charges as being erroneous, and is, therefore, entitled to open the account. That is an allegation which is not supported by the bill itself, because when your

Lordships turn to the bill you find that all that she alleges is, that she "charges that in the accounts so rendered as aforesaid no credit is given to the estate of the said John Farrell Parkinson for any rent received in respect of the said timber-yard subsequently to the 1st day of March, 1832, nor in respect of the said small tenement subsequently to the 5th day of September, 1833, nor for any rent whatever in respect of the said three houses in Galway Street aforesaid, or of the said piece of ground and premises in Coppice Row." And then she "charges that the said defendants ought to set forth whether they, or the said firm, have received any and what moneys by way of rent for the said timber-yard subsequently to the 1st day of March, 1832, and for the said small tenement subsequently to the 5th day of September, 1833, and whether they, or the said firm, have received any and what moneys in respect of the three houses in Galway Street, and the piece of ground and premises in Coppice Row."

I apprehend that where a party seeks to open a settled account, there must be a distinct statement in the bill of some errors in the account — there must be some direct, distinct, and specific averment of errors to entitle the party to open the account. There is nothing of that kind here. The defendants are merely called on to explain whether they have or have not omitted from the account certain items which the appellant says they may have received but have not set forth. Therefore, on that ground alone, I should be disposed to say that this reason for the appeal entirely fails. With regard to the evidence upon the subject, there is a little mystery, which can hardly be explained, as to how some receipts, signed by one Labram, and produced on the part of the appellant, came to be given; but I think the evidence is pretty clear that Labram was not a receiver for the defendants, because it appears by the accounts, that a person of the name of Powell was the receiver of * the rents, and there are the [* 12] accounts with his receipts down to the 7th of June, 1834, the day when the defendants gave up possession.

Under these circumstances, I apprehend that your Lordships cannot hesitate to come to the conclusion that the decree of the VICE-CHANCELLOR is perfectly correct, and that this appeal ought to be dismissed with costs.

Lord CRANWORTH:—

My Lords, I think, with my noble and learned friend, that

the appellant has completely failed in establishing either of the propositions for which she contends. She says that the VICE-CHANCELLOR first of all, and subsequently the LORDS JUSTICES, were wrong in dismissing the bill, so far as it generally sought a decree to account against the respondents as persons who have received money as agents for her, or for her late father, whom she represents; and, secondly, upon the ground that they ought to have been charged as mortgagees for wilful default, whereas they were not so charged.

With regard to the first point, it seems to me to be so abundantly clear that, I was going to say, I wonder that the appellant should have been advised to bring the matter into Court, but probably she was not so advised; but she chose to act upon her own view of the case. The accounts must be treated as settled accounts; the first having been delivered in 1836, but that was thrown overboard afterwards, and other accounts were delivered in 1838. Then, ten years having been allowed for looking into those accounts, a bill having been filed to investigate them, all the accounts of the firm were open to the inspection of the appellant, or her agents, and no objections were taken to them. The bill was finally dismissed pending the present bill, which was filed, irregularly it would seem, while the former bill was still pending. Under these circumstances it is obvious that these must be treated as settled accounts, and it is incumbent, therefore, upon the appellant to point out in her pleadings some distinct error, and establish that error by proof.

I think, without wishing to hold parties strictly or technically to the rule, the substance of it ought always regularly and [*13] rigidly to be insisted upon, that there should be something distinctly alleged by the party who is attacking accounts already treated as settled, to the effect that, although the accounts are so settled and have been so acquiesced in, there are certain errors which escaped his notice, and which must therefore be rectified. Now here the allegation is of the most vague kind possible. It is only an allegation that in respect of some small rents there has been no account rendered of the receipts after a particular date, and that the defendants ought to set forth what receipts there were after that date. The answer the respondents make is this: We had no receipts after that date, and there is no charge in the bill that there ever was a receipt after

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that date. It is said that the defendants ought to set forth what receipts there were; but they cannot do that if there were none. My Lords, the evidence satisfies me that these respondents are not aware of ever having received such moneys; they were said to be very small sums, but on investigation of the books, no such sums appear. Therefore, I think there is a total failure of any allegation, or even, if the allegation was dispensed with, of any proof, that any money was received subsequently to that time. I think, therefore, that the VICE-CHANCELLOR first, and the LORDS JUSTICES afterwards, were perfectly right in dismissing the bill, as far as it rested on those receipts, in the way in which it was dismissed.

Then comes the other point, whether or not the accounts which were directed in respect of the occupation of the Royal Oak public house ought to have been directed charging the defendants both with the receipts and with that which, without wilful default, they might have received. It is meant to charge the respondents with being in receipt as mortgagees upon two grounds. That which was insisted upon mainly, was this: that their title, which they acquired under Chambers, on the 9th of October, 1834, although supposed by them to give them a title as purchasers, really was a title which only put them in the place of Chambers, and Chambers was merely a mortgagee.

I think that it is perfectly clear law, that when a person becomes possessed of a property, though erroneously supposing that he is a purchaser, if it afterwards turns out that he is not to be treated as a purchaser, but only as a person who has a sort of lien * upon the property, that does not make him a [* 14] mortgagee in possession within the meaning of that rule which charges him with wilful default. What was the origin of that rule I do not know, and it is not very clear, or very distinctly laid down in the cases; but it seems to me to depend upon this, that the party taking possession must have known that he was in possession as mortgagee. That seems to me to be essential to the rule. Whether it would be correct to say that, under those circumstances, a person who entered into possession not as mortgagee, may not afterwards become mortgagee in possession with all the liabilities of a mortgagee in possession, is a proposition which need not be laid down now. It is possible that, by distinct circumstances, it may be shown that there was an intention to alter the

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character from the one to the other. But nothing of the sort appears here, and it is perfectly clear that although these respondents were properly treated as parties who had not a valid title as purchasers, because there was nobody who could give a consent to the sale on behalf of the representatives of Parkinson, yet they treated themselves as purchasers having a valid title, and supposed that they were in possession as purchasers, and were therefore liable to account only in the ordinary way for the rents.

Then a point was raised to show that they were mortgagees upon this ground: It seems that they gave up possession as agents on the 7th of June, 1834, and they did not acquire their title as purchasers till the 9th of October, 1834. After they had acquired their possession as purchasers, or supposed purchasers, on the 9th of October, 1834, they received two portions of rent, namely, that which accrued at Midsummer, 1834, and that which accrued at Michaelmas, 1834. Now, it is said that, as purchasers in October, 1834, they could not have been entitled to those rents, because they would only have been entitled to the rent which accrued after they became purchasers. How came they to receive those rents? It is said that, because they were mortgagees under the mortgage of January, 1828, it must be presumed that they received those rents under their title of mortgagees, and not under the purchase from the executors of Chambers.

It appears to me that that would be pushing the doctrine to a most extravagant length. Mortgagees in actual possession [* 15] they *certainly were not, for they only received rents (which is the same thing, however, in point of law), but they did not receive them during the time they were agents, or during the interval between their ceasing to be agents and becoming purchasers; but they received them afterwards, and I take it that they had then no right to receive them as mortgagees. It is certainly too much to force upon persons the character of mortgagees in possession, when they never were in actual possession as such, and never received any rents, except when they had by subsequent arrangement become entitled, as they believed, as purchasers, to the actual possession, or to the actual receipt of rents and profits thence accruing.

It seems to me, therefore, my Lords, that the case entirely fails. It is only very much to be deplored that this lady should have involved herself in this course of protracted and useless litigation.

I agree, therefore, with my noble and learned friend, in thinking that we ought to follow the VICE-CHANCELLOR and the LORDS JUSTICES by dismissing the appeal, with costs.

LORD WESTBURY:—

My Lords, I have felt some anxiety in this case, by reason of the form of the decree to account for the rents and profits, and certainly that is a point which deserves some attention on the part of the house. I take the law to be this. It is undoubtedly settled in the Courts of equity, that if a mortgagee, in that character, enters into receipt of the rents and profits, he will be bound to account, not only for what he has received, but for what, without wilful default, he might have received. It is difficult, perhaps, to ascertain the origin of the rule, but I take it to be this—that when a mortgagee, by virtue of his mortgage, claims to receive the rents and profits, he is regarded in a Court of equity as the bailiff of the mortgagor. Now an account against a bailiff was, both at common law and in equity, given with wilful default. That is almost the only case, save in cases of fraud, or breach of trust, where wilful default is infused into the form of the account. And if the mortgagee is regarded as in the nature of a bailiff to the mortgagor, then it would be proper to give the decree against him, as it is always done against a bailiff with wilful default.

* But if that ground is referred to as the foundation of [*16] the practice, it must of necessity follow, that the party receiving receives in the character to which that relation of bailiff and principal may be properly imputed; and consequently it would follow that if the mortgagee takes in another character, more especially if he receives in a character adverse to the right of the mortgagor, then it would be impossible to ascribe to him, by any inference of law, the conclusion that he intended to take possession, or to receive the rents, as the bailiff of the mortgagor, or that that relation could properly be imputed to him.

Supposing that to be the origin of the rule, it will, therefore, not be applicable to any case where the conclusion of the defendant being in receipt of rent as mortgagee is a conclusion consequential only on your having reduced and set aside some other pretended or alleged title, in respect or by virtue of which he had actually received the rents and profits.

The case here is clearly this: The present respondents claimed the Royal Oak, not in the character of mortgagees, but in the

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character of purchasers of the property from Thomas Chambers, by virtue of his power of sale. In that capacity they entered and enjoyed, and you have to remove that title by decree before you can fasten on them anything like that state of circumstances which would bring them within the character of mortgagees in possession.

But then it was said, on the part of the appellant, with much ingenuity, that it appeared that they had actually received some rent which accrued due at a time anterior to the date of the contract of purchase, and that it was impossible to ascribe that receipt to any other title than a title which they had as second mortgagees. But I do not think that that is a just, or, by any means, a necessary consequence. The fact appears to be, that anterior to the contract of purchase they had been in the receipt of the rents of the Royal Oak, by virtue of an authority which they received from Chambers. Chambers, in fact, had claimed to receive the rents and to have the benefit of the property; and he had exercised that by means of an authority given to the respondents. Supposing that that authority had terminated in the month of June, 1834, anterior to the date of the purchase deed, yet it by no means follows that Chambers had then given up his right [*17] or claim to the receipt of the rents. It is *impossible therefore to ascribe, with any accuracy in point of fact, the receipt of the two sums which actually came into the hands of the respondents, in the months of November, 1834, and January, 1835, both of them after the date of the purchase deed, to the title which they might have asserted as second mortgagees, supposing Chambers had abandoned the receipt.

I collect, therefore, from the facts, that the inference rather would be, that these two sums of money, if they were not received by the respondents by virtue of their purchase contract, were received by them still on behalf of Chambers, and not on behalf of themselves, in the character of second mortgagees. There is no room, therefore, for the argument, ingenious as it was, and which might have had some effect, that anterior to their purchase they were *de facto* in receipt of the rents in the character of mortgagees, by virtue of their second mortgage.

Then we come to the question whether the case is affected by the decision in the case which has been very properly cited by the appellant herself this morning, namely, *Neeson v. Clarkson*,

2 Hare, 163. That is a case which is very material, and which needs some explanation, in order to show that it has not a governing effect upon the case before your Lordships. The case arose under these peculiar circumstances. A man had contracted to purchase a fee simple. He died before he had paid the money. He made his widow his universal legatee and devisee. The equitable estate, therefore, which he acquired by virtue of that contract, passed, under his will, to his widow. His widow married again; and her second husband, supposing himself to be entitled, paid the purchase money under that contract. He then mortgaged the estate, the estate being one to which he was entitled only *jure uxoris*, save in respect of the lien he had on it by having paid the purchase-money. He mortgaged it, and then conveyed it absolutely to a purchaser, in whose purchase deed, however, there were recitals stating, clearly and distinctly, in what character the vendor, that is to say, the second husband, had acquired an interest in the estate. The widow died, and the second husband died; and on the death of the widow, there being no child of her marriage with her second husband, the estate, of course, descended to her heir-at-law. The * heir-at-law filed a bill [* 18] for the redemption of the property, and it was held by the VICE-CHANCELLOR (unquestionably a strong decision) that the recitals in the purchase deed gave distinct notice to the purchaser from the second husband, that all his interest in the estate ceased upon the death of the wife, and that all that he could become entitled to was a claim in respect of the money which his vendor had paid on the original purchase. The purchaser from the second husband claimed to continue in possession. It was held that he had no title to the possession, save in respect of his lien for the purchase-money; and then, certainly by a very strong stretch of the authority of the Court, and of the principle, it was held, that as his purchase deed gave him a most distinct notice of the determination of the title of his vendor, and that he himself had no other claim than in respect of that sum of money which had been paid, his subsequent receipts must be referred to the only interest he had; and accordingly he was charged with an account directed with wilful default.

That approaches very nearly to the present case in favour of the appellant, but certainly stops somewhat short of it, and is distinguishable from it (though, if not distinguishable, I confess I should

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not have been disposed to recommend your Lordships entirely to follow that authority), because in the case then before the VICE-CHANCELLOR there was nothing to set aside; and it was held that the conveyance, upon the very face of it, was pregnant with information to the party that he had no title whatever, save in respect of his lien for the purchase-money. In the present case there was a question to be determined at the hearing. The question was this, whether the power of sale given to Chambers, which in its terms required notice to be given to the personal representatives of Parkinson, could nevertheless be operative, there being no such personal representative. It was held that it could not, and that the power did not arise, and that the conveyance therefore must be set aside. Although that was very right, yet I think it would have been very wrong if the old rule of the Court, founded on the principle of a mortgagee receiving rents, becoming in that respect the bailiff of the mortgagor, had been applied to a case where the parties clearly had taken the property, under a reasonable conclusion that the purchase deed, by virtue [* 19] of which they had acquired *possession, was a valid transaction, and gave them a *bona fide* title.

I am, therefore, my Lords, of opinion in that respect with your Lordships, that the decree was rightly framed in the form in which we find it, and that the present appellant had no title to have the account directed with wilful default.

The other point, my Lords, really is one on which, if we were to give way to the contention of the appellant, we should weaken very much the jurisdiction of the Court. Nothing is more requisite than to abide by the old rule, clearly enunciated by Lord HARDWICKE, and constantly followed, that if you desire to set aside, or to open, a stated and settled account, so as to have liberty to surcharge and falsify, you must, in your bill, specially charge some, at least one, definite and important error, and support that charge with evidence, confirming it as it is laid. Having regard to the manner in which evidence is taken in Courts of equity, there would be no protection to a defendant if he had not, by proper averment in the bill, distinct notice of the allegation that he had to meet, more especially when the whole of the relief turns entirely on the power of the plaintiff to aver, and to prove satisfactorily, some particular error in his account.

In the present case I find nothing in the bill amounting to

a charge that answers at all the requisites of that rule. There is a general charge that items of receipt have been omitted in the account, and an attempt is made in the following way to verify that general charge, by putting a man of the name of Labram into the box, who states that, by virtue of some authority which he alleges himself to have received from a person of the name of Whitling, who, he says, was surveyor for the respondents, he received sums of money in respect of the property included in the trust deed; and he also avers that he never failed to deliver the money to Whitling. No one of these names is mentioned in the bill, nor is there any attempt made on the part of the plaintiff to prove that Whitling had any authority to give Labram the power to receive rents on the part of the respondents, nor is there any attempt to prove that the money which this individual received, and, as he alleged, paid over to Whitling, was at all accounted for by Whitling to the respondents. Now, the account* being directed against them of moneys received by [* 20] them, these circumstances by no means answer the exigency of the rule that the account shall not be opened unless some specific error be clearly alleged, and as clearly proved, by the party requiring the account to be opened.

The propriety of abiding by that rule is still further evidenced in the present case, by the fact that under a suit commenced in the year 1848, four years before the commencement of the present suit, the present appellant had an opportunity of investigating these accounts by a most competent practitioner employed in her behalf. She can therefore have no excuse for any want of precise allegation or averment of error in her present bill of complaint.

Decree and order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, February 14, 1867.

ENGLISH NOTES.

The first branch of the rule laid down in the above principal case has been long recognised as settled law. See *Chambers v. Goldwin* (1801), 5 Ves. 834.

The principle of the rule that a mortgagee in possession is charged with the rents and profits which, but for his default, he might have received, is, that he has chosen to change his character as mere mortgagee, and for the time being to become owner. *Eyre v. Hughes* (1876).

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No. 43, p. 385, *ante* (2 Ch. D. 148, at p. 162, 45 L. J. Ch. 395, 34 L. T. 211, 24 W. R. 597).

Where a mortgagee has taken possession of part only of the lands he will not be held to be in constructive possession of the whole, so as to render him liable to account to subsequent incumbrancers for the rents and profits of the lands which still remain in the possession of the mortgagee. *Ex parte Hooman, Re Vining* (1870), L. R. 10 Eq. 63, 39 L. J. Bh. 4 22 L. T. 179, 18 W. R. 450.

Whether the mortgagee has been guilty of wilful default is a matter of inquiry on taking the account. *Noyes v. Pollock* (1885), 30 Ch. D. 336, 342, 55 L. J. Ch. 54, 53 L. T. 30, 33 W. R. 787. He cannot generally be charged with rents and profits in excess of what he might have received but for gross neglect, mismanagement, or fraud. *Wragg v. Denham* (1836), 2 Y. & C. Ex. 117. If he is in actual occupation of the mortgaged property, he is liable to an occupation rent at the full value. *Lord Trimleston v. Hamill* (1810), 1 Ball & Bea. 377, 385, 12 R. R. 38.

Mortgagees in possession have been frequently held liable for committing or permitting waste to the estate, as in the following instances: —

Misconducting a business. *Chaplin v. Young* (1863), 33 Beav. 330.

Mismanagement as regards cultivation of land. *Wragg v. Denham, supra*.

Allowing buildings to fall out of proper repair. *Russel v. Smythies* (1792), 1 Anstr. 96, 3 R. R. 560.

Default in completing buildings whereby the lease was forfeited. *National Bank of Australasia v. United Hand in Hand, &c. Co.* (P. C. 1879), 4 App. Cas. 391.

Employing a mortgaged ship on a hazardous voyage. *Marriott v. Anchor Reversionary Co.* (1861), 3 De G. F. & J. 177, 30 L. J. Ch. 571, 4 L. T. (N. S.) 590.

Improperly working mines. *Taylor v. Mostyn* (C. A. 1886), 33 Ch. D. 226, 55 L. J. Ch. 893, 55 L. T. 651.

Allowing a purchaser from the mortgagee selling under his power of sale to enter into possession before completion. *Shepard v. Jones* (C. A. 1882), 21 Ch. D. 469, 47 L. T. 604, 31 W. R. 308.

Demising the property under unduly restrictive covenants. *White v. City of London Brewery Co.* (C. A. 1889), 42 Ch. D. 237, 58 L. J. Ch. 855, 38 W. R. 82.

Refusing or removing a respectable and responsible tenant. *Anon.* (1682), 1 Vern. 45.

A mortgagee in possession is liable to account not only to the mortgagor himself, but to his subsequent incumbrancers and creditors, and he will be liable as for wilful default, if under colour of his possession

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he unduly favours the mortgagor to their detriment. *Coppring v. Cooke* (1684), 1 Vern. 270. See *Parker v. Calcraft* (1821), 6 Madd. 11.

With regard to the second branch of the rule laid down in *Parkinson v. Hanbury*, that a mortgagee will not necessarily be chargeable as a mortgagee in possession because he is in receipt of the rents and profits of the mortgaged property, the test as to whether the receipt of the rents and profits amounts to possession has been thus stated: "In order to hold that a mortgagee not in actual possession is in receipt of the rents and profits, in my opinion, it ought to be shown not only that he gets the amount of the rents paid by the tenants, even although he gets their cheques or their cash, but that he receives it in such a way that it can be properly said that he has taken upon himself to intercept the power of the mortgagor to manage his estate, and has himself so managed and received the rents as part of the management of the estate." *Noyes v. Pollock* (C. A. 1884), 32 Ch. D. 53, per COTTON L. J. at p. 61, 55 L. J. Ch. 513, 515, 54 L. T. 473, 34 W. R. 383.

So, if a mortgagee enters into possession as tenant for life or as purchaser of the equity of redemption, or as trustee or agent for the mortgagor or in any other character than that of mortgagee, he will not be accountable as mortgagee in possession. *Lord Kensington v. Bourverie* (1855), 7 De G. M. & G. 134, 156.

Generally, however, a mortgagee who enters into possession will be treated as mortgagee in possession, and be chargeable as such, though he calls himself trustee manager, or agent for the mortgagor. *Lord Trimleston v. Hamill* (1810), 1 Ball & Bea. 377, 12 R. R. 38.

A mortgagee who took possession under a forfeiture clause was held not to be liable as mortgagee in possession. *Blennerhassett v. Day* (1812), 2 Ball & Bea. 124, 125.

Where one of two co-owners of a patent mortgaged his share to the other of them, and the mortgagee worked the patent for his own benefit, it was held that as he had a perfect right to do so in his character as co-owner, he was not liable to account as mortgagee in possession of the mortgaged share in respect to the profits received by him. *Steers v. Rogers* (H. L.) 1893, A. C. 232, 62 L. J. Ch. 671, 68 L. T. 726.

An attornment clause in the mortgage deed will not render the mortgagee chargeable as mortgagee in possession in favour of a subsequent incumbrancer in respect of the rent reserved by the attornment clause. *Stanley v. Grundy* (1883), 22 Ch. D. 478, 52 L. J. Ch. 248, 48 L. T. 606, 31 W. R. 315.

AMERICAN NOTES.

Mortgagee in possession is accountable for rents and profits received, and for such as might have been realized by reasonably provident management.

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2 Jones on Mortgages, sect. 1123, citing principal case: *Scruggs v. Railroad Co.*, 108 United States, 368; *Pineo v. Goodspeed*, 120 Illinois, 524; *Milliken v. Bailey*, 61 Maine, 316; *Donahue v. Chase*, 139 Massachusetts, 407; *Sterenson v. Edwards*, 98 Missouri, 622; *Comstock v. Michael*, 17 Nebraska, 288; *Shaeffer v. Chambers*, 6 New Jersey Eq. 548; 47 Am. Dec. 211; *Van Buren v. Olmstead*, 5 Paige (N. Y. Chan.), 9; *Campbell v. McKimney*, 22 Oregon, 159; *Turner v. Johnson*, 95 Missouri, 431; 6 Am. St. Rep. 62; *Still v. Buzzell*, 60 Vermont, 478; *Stout v. Phillippi M. Co.*, 41 West Virginia, 339; 56 Am. St. Rep. 843; *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; *Emil Kiewert Co. v. Juneau*, 78 Fed. Rep. 708.

If he has not kept a proper account he is chargeable with what he might have received. *Dexter v. Arnold*, 2 Sumner (U. S. Circ. Ct.), 108; *Van Buren v. Olmstead*, 5 Paige (N. Y. Chan.), 9; *Clark v. Smith*, Saxton (New Jersey Ch.), 121.

He is liable for rent from a notoriously insolvent tenant. *Green v. Turner*, 36 Arkansas, 17; *Miller v. Lincoln*, 6 Gray (Mass.), 556; *Hagthorp v. Hook*, 1 Gill & Johnson (Maryland), 270. But he is not bound to keep a bar in a hotel. *Curtiss v. Sheldon*, 91 Michigan, 390. He is liable for rent lost through gross neglect of his agent. *Montague v. Boston, &c. R. Co.*, 124 Mass. 242.

If he himself occupies, he is liable for a fair rent. *Dawson v. Drake*, 30 New Jersey Equity, 601; *Barnett v. Nelson*, 54 Iowa, 41; 37 Am. Rep. 183; *Van Buren v. Olmstead*, 5 Paige (N. Y. Chan.), 9; *Sanders v. Wilson*, 34 Vermont, 318.

Mr. Pomeroy is of opinion that the mortgagee in possession is not liable for rents not received except in case of "wilful default." He says (sect. 1216, note): "Some of the American cases make him chargeable, under these circumstances, with the amount of rent which he might with reasonable diligence have received; but this extensive liability, which is that of fiduciary persons, is not sustained by the weight of authority;" citing the principal case; *Blum v. Mitchell*, 59 Alabama, 535; *Adkins v. Lewis*, 5 Oregon, 292; *Cook v. Ottawa University*, 14 Kansas, 548; *Freitag v. Hoelnd*, 23 New Jersey Eq. 36; *Shaeffer v. Chambers*, 6 *ibid.* 548; 47 Am. Dec. 211; *Van Buren v. Olmstead*, 5 Paige (N. Y. Chan.), 9; *Milliken v. Bailey*, 61 Maine, 316; *Harper v. Ely*, 56 Illinois, 179; *Pierce v. Robinson*, 13 California, 116; *Merriam v. Goss*, 139 Mass. 77; *Young v. Omohundro*, 69 Maryland, 424; *Steen v. Mark*, 32 South Carolina, 286. An examination of these cases shows that none of them sustain Mr. Pomeroy's text. *Van Buren v. Olmstead* and *Shaeffer v. Chambers* are directly to the contrary. In the former the chancellor said: "If the premises have not been rented out at a fair cash rent, (let) the master charge a fair cash rent therefor, such as might have been received with reasonable care and prudence." In the latter it is said: "A mortgagee in possession is not at liberty to permit the property to go to waste, but is bound to keep it in good ordinary repair, and if it be a farm he is bound to good ordinary husbandry. Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them: or should he be held to show proper diligence to procure a tenant?"

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Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in *Anonymous*, 1 Vern. 45 : or does the fact of the premises being left vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in *Metcalf v. Campion*, 1 Molloy's Irish Chancery, 238? It seems to me that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant : and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But at all events, if the farm and buildings are not rented he ought to cause the farm to be tilled, and that in a husbandlike manner. No provident owner would have treated them as he has." Kent (4 Com. 166), states that the mortgagee "will be accountable for the actual receipt of the net rents and profits, and nothing more unless they were reduced or lost by his wilful default or gross negligence." But he continues : "By taking possession he imposes upon himself the duty of a provident owner, and is bound to recover what such an owner would with reasonable diligence have received;" thus leaving the matter vague and inconsistent. I think Mr. Jones states the correct doctrine, as set out at the beginning of this note, and that it is sustained by his citations. The correct doctrine is stated in *Still v. Buzzell*, 60 Vermont, 478 : "he was thereafter accountable for the rents and profits which he ought to have received from the use of it." Some cases, however, seem to state a narrower liability. Thus in *Butts v. Broughton*, 72 Alabama, 294, it is said the mortgagee is liable for such rents "as he has failed to collect through gross negligence, wilful default, or fraud." In *Murdock v. Clarke*, 90 California, 427, the rule is that he is bound to reasonable care and diligence, but not to the strict liability of a trustee. In *Booth v. Baltimore S. P. Co.*, 63 Maryland, 39, the liability was held to be "what he has received or what he might have received without his own wilful default." (Citing *Lord Kensington v. Bouverie*, 7 De G., M. & G., 157.)

The doctrine of the rule as to entry under another character is recognized : 2 Jones on Mortgages, sect. 1123 a (citing the principal case) ; *Morris v. Budlong*, 78 New York, 543 (citing the principal case) ; *Moore v. Cable*, 1 Johnson Chancery (N. Y.), 384 ; *Harper's Appeal*, 64 Penn. St. 315. As a purchaser for taxes : *Hall v. Westcott*, 17 Rhode Island, 504 (citing the principal case) ; or as a trespasser, or tenant under mortgagor : *Daniel v. Coker*, 70 Alabama, 260 (citing the principal case) ; and see *Gaskell v. Viquesay*, 122 Indiana, 244 ; *Young v. Omohundro*, 69 Maryland, 424 ; *Hart v. Chase*, 46 Connecticut, 207 (tenant by curtesy) ; *Van Dugne v. Shann*, 41 New Jersey Eq. 312. The entry and possession must be as mortgagee : 3 Pomeroy Eq. Jur., sect. 1215, citing the principal case, and *Sanford v. Pierce*, 126 Mass. 146 ; *Rogers v. Benton*, 39 Minnesota, 39 ; 12 Am. St. Rep. 613.

No. 46. — Lockhart v. Hardy, 9 Beav. 349, 350. — Rule.

No. 46. — LOCKHART v. HARDY

(CH. 1846.)

RULE.

A MORTGAGEE may (in the absence of agreement to the contrary) at the same time proceed on all his remedies at once, or use such of his remedies as will give him the easiest relief against the mortgagor or a subsequent incumbrancer or assignee.

Lockhart v. Hardy.

9 Beavan, 349–358 (s. c. 15 L. J. Ch. 347; 10 Jur. 532).

Mortgage. — Foreclosure and Sale. — Bond and Covenant.

[349] After foreclosure, the mortgagee fairly sold the estate for less than what was due to him. *Held*, that he could not afterwards recover from the mortgagor, upon his collateral personal securities, the amount still remaining unpaid.

Where a debt is secured by mortgage, covenant, and bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor becomes entitled to the estate, but if he obtains part payment only, he may go on with his foreclosure suit and foreclose for the remainder. On the other hand, if he forecloses first, and the value of the estate proves insufficient to satisfy the debt, he may, while the mortgaged estate remains in his power, sue on the bond or covenant, but he thereby opens the foreclosure, and the mortgagor may thereupon redeem.

This case came before the Court, upon exceptions to the Master's report.

The case, as appearing by the Master's report and the [* 350] admissions of the parties, was, that in the year *1828, a person of the name of Smith conveyed an estate to John Ingram Lockhart, by way of mortgage to secure the repayment of the sum of £2999 lent, and afterwards on the 14th of December, 1829, he executed a deed, whereby he created a further charge on the same estate, in favour of Lockhart, for the sum of £500. John Ingram Lockhart being entitled to this mortgage, borrowed of or became indebted to William Browne, since deceased, in the sum of £1600, and by deed dated the 17th of August, 1831, made between Lockhart of the first part, Smith of the second part, and William

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Browne of the third part, in consideration of £1600 due from Lockhart to Browne, the mortgage debts of £2999, and £500 were assigned to Browne, on trust, amongst other things, to pay costs to satisfy the £1600 and interest, and to pay the surplus to Lockhart: and the mortgaged estate was conveyed to Browne, subject to a proviso for redemption on the payment of £1600 and interest, which were further secured by a covenant and bond.

Browne died in December, 1831, and William Browne and John Browne became his legal personal representatives.

John Ingram Lockhart died in August, 1835, and Alder was his legal personal representative.

A bill was filed by the Brownes to foreclose the mortgage estate, and on the 20th of December, 1841, a decree was made in the usual manner for accounts and foreclosure.

On the 2nd of May, 1842, the Master reported, that on the mortgage to Lockhart there was due from Smith to Lockhart's estate £5436 0s. 3*d.*, and that on the mortgage from Lockhart to Browne there was due from the * estate of Lockhart [* 351] to the estate of Browne the sum of £2136 12s. 9*d.* A day was, in the usual manner, appointed for payment, and default being made, the mortgaged estate was foreclosed, as against Smith, on the 9th of December, 1842. On the 2nd of February, 1843, it was reported, that £2401 18s. 7*d.* was due to the estate of Browne from the estate of Lockhart; a day was appointed for payment, and default being made, the mortgage was ultimately foreclosed as against Alder and the Lockharts.

After this, the Brownes, being in possession of the mortgaged estate, sold it absolutely to Mr. Tomlinson for £1999, and the estate was conveyed to him, and was now entirely out of the power of the Brownes. It was admitted that the estate had been fairly sold.

A decree was afterwards made for the administration of the estate of John Ingram Lockhart. The Brownes went in under the decree, and claimed to be allowed to prove, on the bond, for the residue of the mortgage debt after deducting the purchase-money as a debt on the covenant or bond, against the estate of John Ingram Lockhart; and the Master having allowed their claim to the amount of £642 8s. 11*d.*, Mr. Alder, the legal personal representative of John Ingram Lockhart, took exceptions to the report, and alleged that nothing ought to have been found due to the Brownes.

Mr. Kindersley and Mr. Lloyd, in support of the exceptions.

After foreclosure and subsequent sale, the mortgagee cannot proceed against the mortgagor on his other securities. The mortgagee having sold the estate at his own risk, and for his own benefit cannot in the case of its producing less than his debt, call on the mortgagor to make good the deficiency, any more [* 352] than * the mortgagor, if the estate sold for double the amount of the debt, could insist on the return of the surplus. The original contract is a mere pledge of the estate, which the mortgagee undertakes to restore on full payment of the debt. By foreclosure, the mortgagee has elected to take the estate in satisfaction of the debt, which, in equity, has become extinguished, by the conversion of the holder of the pledge into an absolute owner of the mortgaged property. The mortgagee may still at law proceed on his other securities, but a Court of equity will not allow him to proceed, unless he restores the pledge on full payment of what is due, — in other words, he opens the foreclosure; but if, by his course of dealing with the property, the mortgagee has disabled himself from restoring the pledge, after taking it by foreclosure, he will not be permitted to sue the mortgagor on the other securities.

The case of *Tooke v. Hartley*, 2 Bro. C. C. 125; Dickens, 785, does not apply, for there the estate (as was observed by Lord ELDON in *Perry v. Barker*, 8 Ves. p. 530, 13 Ves. 198) "sold or not was in the possession of the mortgagee." He could therefore give effect to the rights of the mortgagor consequent upon the opening of the foreclosure. Here the estate is admitted to be completely out of the mortgagee's power.

The mortgage contains no power of sale, and this Court has no jurisdiction to direct a sale of the estate for the satisfaction of the mortgage debt; but if this course of proceeding by a mortgagee be sanctioned, the mortgagee will obtain, indirectly, that to which he is entitled neither by contract nor by the course of the [* 353] Court. It would be unjust to bind a mortgagor by a * sale, made without his concurrence, and in his absence, or to permit a mortgagee to sell the estate at the risk of a mortgagor, after a lapse of time, and when the estate may perhaps have become deteriorated. The tendency of Lord ELDON's remarks in *Perry v. Barker* is certainly against any such equity, and that is confirmed by the ultimate decision in the case (13 Ves. 198) made by Lord ERSKINE, after a communication with Lord REDESDALE, when the Court was of opinion that the foreclosure was opened;

and that, if there were any probability that the mortgagee could get the estate back again, he ought to have a time limited for that purpose; here it is admitted to be impossible.

Mr. Lowndes for other parties in the same interest.

Mr. Turner and Mr. Shapter, for the Brownes. Nothing has occurred to overrule the "clear opinion" of Lord THURLOW in *Tooke v. Hartley*: "that an action might be brought for the difference if the mortgaged estate were sold out and out, fairly, without collusion, and for the best price, and not as (through some mistake) stated in *Perry v. Barker*, 8 Ves. p. 531, if the estate still remained in the possession of the mortgagee." It is evident both from the note of Chief Baron RICHARDS (2 Bro. C. C. 125 *n.* Belt's ed.) and the report of the same case in Dickens (2 Dickens, 785), that the estate was not in the possession of the mortgagee. According to the report of *Tooke v. Hartley*, contained in Dickens, Lord THURLOW was clear that the defendant, the mortgagee, under the mortgagor's covenant in the mortgage deed, was entitled to be paid what was due on the mortgage; that so long as he kept the *estate, he must take the pledge as a satisfaction, [* 354] because by not knowing what it would produce, he could not say anything was due; but if he sold the estate fairly, and without collusion, and for the best price, it would then appear whether it produced the amount of the money reported due, and to the extent of what it did not the mortgagee had a right, and so it was now established, to bring an action against the mortgagor to recover the deficiency, and therefore his Lordship disallowed the cause, and dissolved the injunction.

It must be remembered that the mortgagee has a legal right which ought not to be controlled by a Court of equity, except on principles of equity. The debt remains unpaid, the value of the pledge has been fairly realized, and the deficiency ascertained; why, while there is a legal contract for repayment, a legal remedy to recover it, and a sufficiency of assets, is a mortgagee to be deprived of payment of his just debt?

They also referred to *Mason v. Bogg*, 2 My. & Cr. 443; and *Dyson v. Morris*, 1 Hare, 413; 2 Plow. Mortg. 1001 *n.*

Mr. Kindersley in reply.

The MASTER OF THE ROLLS (Lord LANGDALE):—

The contract, in this case, consisted of a pledge of land accompanied by a covenant and bond, and the mortgagor expected, no

doubt, that on full payment of the debt he would have the estate back again.

A mortgagee may pursue all his remedies at the same [*355] time. If he obtains full payment by suing on *the bond, he prevents a foreclosure. If only part payment is obtained, he must account for what he has received, and may foreclose for the residue. If a mortgagee obtains a foreclosure first, and alleges that the value of the estate is insufficient to pay what is due to him, he is not precluded from suing on the bond; but if he thinks fit to do so, he must give the mortgagor a new right to redeem, notwithstanding the foreclosure, and the mortgagor may file a bill to redeem. I apprehend that so long as the mortgagee holds the estate, and is able to give effect to the mortgagor's right to redeem, he may proceed on the bond.

But that is not the question here; for the mortgagee has foreclosed, and afterwards sold the estate, and he now proceeds on the bond. But how can the estate be had back? Lord THURLOW thought that if the estate were properly sold, the mortgagee might recover the difference. Lord ELDON seems to have entertained a different opinion, and the question now before me seems to be to determine between these conflicting opinions. I will take time to consider.

April 18. The MASTER OF THE ROLLS:—

It must be borne in mind that this is a case of mortgage with other securities, and not a case of trust to sell, accompanied by other securities.

It is decided, that if a debt is secured by the mortgage of a real estate, and also by covenant and by bond, the mortgagee may pursue all his remedies at the same time. If he obtains full payment on the bond or covenant, the mortgagor is, by the [*356] fact of *payment, entitled to redeem the estate, and foreclosure is prevented or not allowed.

But if the mortgagee obtains only part payment on the bond or covenant, he may go on with his foreclosure suit, and giving credit, in account, for that which he has recovered on the bond or covenant, he may foreclose for non-payment of the remainder.

On the other hand, if he obtains foreclosure first, and alleges that the value of the estate is not sufficient to satisfy the debt, he is not absolutely precluded from suing on the bond or covenant. But it is held that by doing so, he gives to the mortgagor a renewed

right to redeem, or in other words, opens the foreclosure; and consequently, upon the commencement of an action against him on the bond after foreclosure, the mortgagor may file a bill for redemption, and upon payment of the whole debt secured by the bond, he is entitled to have the estate back again, and the securities given up; and I conceive that after foreclosure, the Court will not restrain the mortgagee from suing on the bond, provided he retains the mortgaged estate in his own power, ready to be redeemed, in case the mortgagor should think fit to avail himself of the opening of the foreclosure.

The question now is, whether such an action can be sustained, after the mortgagee has sold the estate, and deprived himself of the power of restoring it to the mortgagor on full payment of the whole debt. It does not seem unreasonable, when the difference between the whole debt and the price of the estates, fairly sold, is all that is sought to be recovered in the action. But I apprehend that the rules as to opening the foreclosure are founded on this, that in this Court, the *mortgagor, if he [*357] does not pay the whole debt, may lose the whole estate, however valuable; but that if he does pay the whole debt, he is entitled to have the estate restored to him; and it seems to follow that the mortgagee, having got the estate, is not to proceed against the mortgagor for full payment, if he cannot restore the estate. If this be so whilst the estate remains in his hands, how can it be altered by any separate dealing of his own with the estate, without the consent of, or any agreement with, the mortgagor?

The mortgagee had, by his securities, a right to foreclose the mortgage, and if he thought the estate insufficient, a further right to proceed on his personal securities, thereby giving to the mortgagor a renewed right to redeem; but when he has so dealt with the estate that the mortgagor cannot redeem, it appears to me that he is not entitled to proceed, and that this Court would restrain him from proceeding on the personal securities. I think, therefore, that the exceptions to the Master's report must be allowed.

It must be owned that the case of *Tooke v. Hartley*, 2 Bro. C. C. 125; 2 Dick. 785, and the case of *Perry v. Barker*, 8 Ves. 527, have left this matter in great obscurity, and I find it difficult to understand the various opinions stated. I proceed upon this, that, in equity, the mortgagee is bound to restore the estate on full payment of the debt; and that having sold the estate, and thereby disabled himself from restoring it, he is not in a condition to

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demand payment of the whole debt, which he does when he sues on the bond. If he sued on the covenant, he might lay his damages at the difference between the debt and the price [*358] of the estate sold. This would be *obtaining full payment of the debt, taking the value of the estate as part. I incline to think that it would be altering the nature of the contract between the parties, and giving to the mortgagee the benefit of a trust for sale with a bond or covenant for the deficiency, instead of a mortgage bond or covenant. It might be reasonable to do this, and desirable to have it done, but it does not appear to me that such is the law at present.

ENGLISH NOTES.

The privilege conferred on a mortgagee by the above rule forms an exception to the general rule of equity that a party suing at law should not be allowed to sue at the same time in respect of the same matter. The result of the rule is that the mortgagee may proceed on his bond or covenant and other collateral securities, and claim foreclosure and recovery of possession or sale of the mortgaged property, and in a proper case obtain the appointment of a receiver simultaneously, and since the Judicature Act 1873 (36 & 37 Vict., c. 66, s. 24), in the same action. So under the former practice, a mortgagee might have brought an action for ejectment at law, while he had a suit for foreclosure pending in equity. *Booth v. Booth* (1742), 2 Atk. 343. See also *Schoole v. Sall* (1803), 1 Sch. & Lef. 176; *Stokoe v. Robson* (1814), 3 Ves. & Bea. 51; *Shelwardine v. Harrop* (1821), 6 Madd. 39, 22 R. R. 232; *Bentinck v. Willink* (1842), 2 Hare, 1; *Re Kelday, ex parte Meston* (1888), 36 W. R. 585.

So also if the mortgaged property is sold by the mortgagee under his power of sale, or is sold by order of the court and the proceeds of sale are insufficient to satisfy what is due for principal, interest, and costs, the mortgagee may sue the mortgagor for the deficiency. *Rudge v. Richens* (1863), L. R. 8 C. P. 358, 42 L. J. C. P. 127, 28 L. T. 534; *Re Talbot, King v. Chick* (1888), 39 Ch. D. 567, 58 L. J. Ch. 70, 60 L. T. 45, 39 W. R. 233. See, however, as to the right to prove for the balance in the winding up of a company, *In re London, Windsor, and Greenwich Hotel Co., Quartermaine's Case*, 1892, 1 Ch. 639, 61 L. J. Ch. 273, 66 L. T. 19, 40 W. R. 298.

There are certain exceptions to this rule, as to the general right of a mortgagee to avail himself of all his remedies at his pleasure.

First, if a mortgagee, before having recourse to any other remedies, brings an action for foreclosure and obtains a decree absolute, he will not

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be allowed, on the alleged ground of insufficiency in value of the property to sue the mortgagor on the covenant for payment, and also retain the property.

The effect of bringing an action on the covenant after foreclosure absolute is to open the foreclosure and revive the right of redemption. *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317; *Perry v. Barker* (1806), 13 Ves. 198. If the mortgagee by selling the property precludes the mortgagor from opening the foreclosure, he will not be allowed to sue on the covenant if the proceeds of sale prove insufficient to satisfy the debt. *Palmer v. Hendrie* (1860), 27 Beav. 349. So also a mortgagee will not be allowed after a foreclosure suit to prove in an administration action for an alleged deficiency except upon the terms of giving up the property. *Lockhart v. Hardy*, *supra*; see *Haynes v. Haynes* (1857), 3 Jur. (N. S.) 504.

Secondly, a mortgagee will not be allowed to proceed on any remedy if he has expressly or impliedly agreed not to exercise such remedy. *Cockell v. Bacon* (1852), 16 Beav. 158; see *Sherborne v. Tollemache* (1863), 13 C. B. (N. S.) 742.

Thirdly, a mortgagee may be precluded from exercising a particular remedy if by subsequent contract with the mortgagor the relations of the parties have been altered, or if third parties have acquired rights from the mortgagor with the concurrence or acquiescence of the mortgagee. *Moreland v. Richardson* (1858), 24 Beav. 33; *Mold v. Wheatecroft* (1860), 27 Beav. 510, 29 L. J. Ch. 11.

Fourthly, where a security is given by way of annuity, conferring on the grantee special remedies by distress and entry, either in express terms or by virtue of statutory enactment, and the rents are sufficient to answer the annuity, he will not be allowed to enforce his remedies in equity. *Burton v. Monkhouse* (1810), 1 G. Cowp. 41. See *Kelsey v. Kelsey* (1874), L. R. 17 Eq. 495, 30 L. T. 82, 22 W. R. 433.

Lastly, a mortgagor may under the statute 7 Geo. II. c. 20, stay any action by the mortgagee by paying the money claimed, but so as not to affect cases where the right of redemption is disputed or the amount due not adjusted, and so as not to prejudice any subsequent mortgagees.

A mortgagor is estopped by the mortgage deed from denying the mortgagee's title by setting up a legal title in a third person paramount to that of the mortgagor, so as to defend his own possession as against the mortgagee. *Doe d. Ogle v. Tickers* (1836), 4 Ad. & Ell. 782.

AMERICAN NOTES.

This principle, in the absence of statutory provision, is approved in 2 Jones on Mortgages, sect. 1215, citing *Garforth v. Bradley*, 2 Vesey, 678; *Gilman v. Illinois, &c. Tel. Co.* 91 United States, 603; *Torrey v. Cook*, 116 Massachu-

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setts, 163; *Brown v. Stewart*, 1 Maryland Chan. 87; *Jones v. Coude*, 6 Johnson Chan. (N. Y.) 77; *Fery v. Watkins*, 18 Arkansas, 546; *Smith v. Shuler*, 12 Sergeant & Rawle (Penn.), 240; *Coit v. Fitch*, Kirby (Conn.), 254; 1 Am. Dec. 20; *Wilkinson v. Flowers*, 37 Mississippi, 579; 75 Am. Dec. 79; *Wiswell v. Baxter*, 20 Wisconsin, 680; *Brown v. Cascaden*, 43 Iowa, 103; *Cross v. Burns*, 17 Indiana, 111; *Micou v. Ashurst*, 55 Alabama, 607; *Stephens v. Greene, &c. Co.*, 11 Heiskell (Tenn.), 71; *Delespine v. Campbell*, 52 Texas, 4; *Copperthwait v. Dummer*, 18 New-Jersey Law, 258; *Thornton v. Pigg*, 24 Missouri, 249; *Karnes v. Lloyd*, 52 Illinois, 113. In *Gilman v. Illinois, &c. Tel. Co.*, *supra*, the Court said, that in the absence of statutory regulation, the mortgagee might at the same time sue on the note or obligation, bring ejectment, and file a bill for foreclosure.

But in some States the remedy is by statute limited to foreclosure with judgment against the mortgagor personally for deficiency. *Anderson v. Pilgrim*, 30 South Carolina, 499.

Under Code practice it is probable that where a sufficient remedy is afforded by a single proceeding the mortgagee would be restricted to that.

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(1811.)

RULE.

A MORTGAGEE selling under his power of sale can make a good title to the purchaser without the concurrence of the mortgagor.

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18 Vesey, 344-348.

Sale by Mortgagee under Power. — Concurrence of Mortgagor unnecessary.

[344] Specific performance against a purchaser under a power of sale in a mortgage deed without the mortgagor, though under a covenant to the mortgagee to join in a sale decreed, but without costs, the only authority produced not being in print.

By indentures, dated the 8th of February, 1804, William Restorick conveyed to the plaintiff, his heirs and assigns, subject to the mortgage to Thomas Beed for £500, and also subject to redemption on payment of the sum of £500 due to the plaintiff, with interest, on the 8th of June next, and of such other sums as should before redemption of the premises become due to the plaintiff from Restorick, for money advanced or paid by the plaintiff, &c., and it was declared, that in case default should be made by Restorick in payment of the said sum of

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£500, then actually due, or such sums as should after become due from him to the plaintiff, or interest, by fourteen days after payment required, it should be lawful for the plaintiff, and he was thereby expressly required of his own proper authority, and without any farther authority or direction from the said William Restorick, his heirs, executors, administrators, or assigns, to make sale and dispose of the said hereditaments and premises thereby released, and every part thereof, either absolutely or conditionally and by way of mortgage; or to demise and lease the same, or any part or parts thereof, for any term or number of years, at such rents or rent as he should think proper; such sale or sales to be either together or in parcels, by public auction or private contract, for the best price that could or might be reasonably had for the same; and such mortgage or mortgages, lease or leases, to be made of the whole or any part thereof to any person or persons who should be willing to purchase the same, or to take a mortgage or mortgages, lease or leases, thereof; who having paid his, her, or their purchase, mortgage, * premium, or other [* 345] consideration money or moneys, and having obtained a receipt or receipts for the same from the plaintiff, his heirs, executors, or administrators, should be by such receipt or receipts freely and absolutely discharged from such purchase money, &c., and such purchaser, mortgagee, lessee, &c. should not be obliged to see to the application, or be answerable for the misapplication or non-application of the money; and the money arising by the sale should be applied first to the expenses of the sale, next to the mortgage to Beed, unless the sale should be subject to that mortgage; and after payment thereof, or subject thereto, in payment of the plaintiff; and then the residue of the moneys so to arise are to be paid to the said William Restorick, his executors, administrators, or assigns; and it was covenanted and agreed, that in case the said hereditaments and premises should be sold, he the said William Restorick, his heirs or assigns, would join in such sale, and execute the several conveyances of the premises to be sold to the use of the purchaser, his heirs or assigns: nevertheless it was declared that the joining of the said William Restorick, his heirs or assigns, in any such sale, should not in any wise be deemed essential or necessary to perfect the title of the purchaser or purchasers; the same being intended for the farther satisfaction of such purchaser or purchasers.

The plaintiff took an assignment of Beed's mortgage; and, having given the proper notice, agreed to sell the premises to the defendant for £945; and the bill prayed a specific performance of that agreement.

The defendant by his answer submitted, that the plaintiff was bound to procure Restorick and the assignees under a Commission of Bankruptcy against him to join in the conveyance; as the plaintiff undertook to make out a proper title to the [* 346] premises by good conveyances and *assurances in law, to convey a good and indefeasible estate of inheritance in fee simple.

Sir Samuel Romilly and Mr. Spranger, for the plaintiff, contended that this title is under the power of sale in the mortgage deed perfectly free from objection; and the case of *Clay v. Sharpe*¹ was produced from the Register's Book.

Mr. Joseph Martin, for the defendant.

[* 347] The undertaking of the mortgagor in the mortgage * deed, that he will for the farther satisfaction of the purchaser join in the sale, authorised by that deed, entitles the defendant to have him a party to the conveyance. In *Croft v. Powell*, Com. 603, 608, it is said, upon a case similar to this, that a purchaser would insist upon the mortgagor's joining in the conveyance; and in *The King v. The Inhabitants of Edington*, 1 East, 288, 294, Lord KENYON intimates that a Court of equity would control a power given to a mortgagee to sell the mortgaged premises.

Sir Samuel Romilly, in reply, suggested that something material was probably omitted in the note of Lord KENYON's observation,

¹ *Clay v. Sharpe*, in Chancery, March, 1802, Reg. Book, A. fol. 66.

Upon a mortgage in 1798, to a trustee of leasehold property, held for the remainder of a term of twenty-one years, it was agreed that, if default should be made in payment of the money, the trustee might sell the mortgaged premises, discharge the money due upon the mortgage, and pay the residue to the mortgagor; who covenanted that, in case of a sale he would join in executing an assignment to the purchaser; but that such joining in the execution of the assignment should not be considered as essential to perfect the title, being intended only as a farther satisfaction to the purchaser.

Default being made in payment of the money, the trustee sold by public auction. The purchaser insisted on the concurrence of the mortgagor; and on his refusal to join, filed a bill against the trustee and the mortgagor; and, upon the bankruptcy of the latter, a supplemental bill against the assignees under his commission. The mortgagor by his answer stated that he resisted the sale, as made without his consent and at an undervalue.

The LORD CHANCELLOR dismissed the bill against the mortgagor with costs, and decreed the agreement to be carried into execution on payment of the residue of the money.

taken by a gentleman not practising in Courts of equity; and distinguished *Croft v. Powell*, where the power of sale was by a defeasance.

The MASTER OF THE ROLLS (Sir WILLIAM GRANT) said that, when the cause was opened, he was unable to suggest any principle on which the defendant could properly insist on the mortgagor's being a party to the conveyance. His opinion was, that the clause in the mortgage deed, relied on for the defendant, empowering the plaintiff to sell, whereby the mortgagor undertook to join in the conveyance, was a mere contract between the mortgagor and mortgagee; to the benefit of which the defendant, as a purchaser, was not entitled: and there was nothing in the nature of the contract between the plaintiff and his mortgagor which prevented the latter giving, and the former exercising, such a power of sale of the premises as that upon which this question arose. The case of *Clay v. Sharpe*, cited by Sir Samuel Romilly, is an authority precisely applicable to this case.

* A specific performance was decreed according to the [* 348] prayer of the bill: but the MASTER OF THE ROLLS said, he did not think it a case for costs, as the case of *Clay v. Sharpe* was not in print.

ENGLISH NOTES.

Formerly, in order to enable mortgagees to sell the mortgaged property without recourse to the Court, it was necessary that the mortgage deed should have contained express powers conferring the right so to do. But these express powers are now usually omitted in reliance on the powers of sale conferred on mortgagees by recent statutes.

By section 11 of Lord Cranworth's Act (23 & 24 Vict., c. 145), powers of sale over the mortgage hereditaments of whatever tenure were given to mortgagees, and might be exercised in manner provided by the next following sections of the Act, except so far as negated or modified by the provisions of the mortgage deed.

These sections of Lord Cranworth's Act are repealed by the Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c. 41), sect. 71 and 2d schedule, but the repeal does not affect the exercise of powers of sale contained in mortgages made prior to 1882. See *Re Solomon and Meagher's Contract* (1889), 40 Ch. D. 508, 58 L. J. Ch. 339, 60 L. T. 487, 37 W. R. 331.

The last mentioned Act by section 19 confers on mortgagees, where the mortgage is made by deed, among other powers a power of sale of the mortgaged property whether real or personal. This power is exercisable

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in the manner prescribed by the Act, except so far as negatived, varied, or extended by the mortgage deed. This enactment only applies to mortgage deeds executed on or after the 1st January, 1882.

As regards registered charges under the Land Transfer Act 1875 (38 & 39 Vict., c. 87) the registered proprietor of a charge registered with power of sale is empowered to sell the land charged, as if he were the registered proprietor of such land.

An express power of sale is usually given to the mortgagee, his executors, administrators, and assigns; and unless the power is expressly given to the "assigns," the assignee or devisee of the mortgagee cannot exercise the power and make a good title to the purchaser. *Cooke v. Crawford* (1842), 13 Sim. 91; *Titley v. Wolstenholme* (1844), 7 Beav. 425; *Re Morton and Hallett* (C. A. 1880), 15 Ch. D. 143, 49 L. J. Ch. 559, 42 L. T. 602, 28 W. R. 895.

As regards sales under statutory powers, whether under Lord Cranworth's Act or the Conveyancing and Law of Property Act 1881, no question of this kind can arise; for such powers are exercisable under the former Act "by the person to whom the principal money secured shall for the time being be payable, his executors, administrators, and assigns." By sect. 21 (4) of the latter Act it is enacted that, "The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money."

Express powers of sale are usually made exercisable only on default of payment of principal and interest on the day fixed by the deed, and are accordingly not exercisable before that date. And after that time they are generally made exercisable only after the expiration of a notice (usually six months), or unless interest has fallen into arrear for a certain time (usually three months). Under Lord Cranworth's Act, a mortgagee could not sell until after the expiration of one year from the time when the principal had become payable according to the terms of the deed, or unless interest was in arrear for six months, or there had been a breach of a covenant to insure against fire.

In the absence of any stipulation as to notice in a mortgage made before 1st January, 1882, a mortgagee having a power of sale may sell the mortgaged property at any time after default without any notice to the mortgagor. *Hawkins v. Ramsbottom* (1814), 1 Price, 138.

By section 19 of the Conveyancing and Law of Property Act 1881, the power is exercisable only "when the mortgage money has become due," and by section 20 of the same Act it is enacted that: "A mortgagee shall not exercise the power of sale conferred by this Act unless and until —

- (1.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and

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default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(II.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(III.) There has been a breach of some provision contained in the mortgage deed or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.”

Section 67 of this Act contains regulations as to notices given under that Act.

Where express powers of sale are made exercisable only on certain conditions as to notice or otherwise, a proviso is usually inserted known as the “purchaser’s protection clause,” to the effect that upon any sale purporting to be made in pursuance of the power the purchaser shall not be bound to inquire whether the conditions have been performed or observed. *Dicker v. Angerstein* (1876), 3 Ch. D. 600, 45 L. J. Ch. 754. 24 W. R. 844.

With regard to purchasers from mortgagees selling under statutory powers of sale, Lord Cranworth’s Act, s. 13, provided that the purchaser’s title should not be liable to be impeached by reason of no case for sale having arisen, or no notice having been given; but that the remedy of any person damnified should be in damages against the person selling.

By the Conveyancing and Law of Property Act 1881, it is enacted as follows:—

Sect. 21 (2). “Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case has arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

Neither an express protection nor the statutory protection will extend to cases where the purchaser has bought with notice of impropriety in the sale. *Parkinson v. Hanbury* (H. L. 1867), No. 45, p. 11, *ante* (L. R. 2 H. L. 1); *Selwyn v. Garfitt* (C. A. 1888), 38 Ch. D. 273, 57 L. J. Ch. 609, 59 L. T. 233, 36 W. R. 513; *Bailey v. Barnes* (C. A. 1893), p. 510, *post*, 1894, 1 Ch. 25, 63 L. J. Ch. 73, 69 L. T. 542, 42 W. R. 66).

Express powers of sale usually empowered the mortgagee, his executors, administrators, and assigns, to execute and do all such assurances and things as they should think fit, and directed that the heir should concur to convey the legal estate.

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Lord Cranworth's Act, by section 15, empowered mortgagees to convey the property sold by them under their power to a purchaser "for all the estate and interest therein which the person who created the charge had power to dispose of." And by section 16 of the same Act the mortgagee might require the mortgagor to deliver to him the title deeds and to convey the legal estate if outstanding in the mortgagor.

By sect. 21 of the Conveyancing and Law of Property Act 1881, a mortgagee exercising his power of sale under that Act is empowered to convey the property only "for such estate and interest therein as is the subject of the mortgage."

The difference of language between the two Acts is important. An equitable mortgagee selling under Lord Cranworth's Act can convey the legal estate vested in the mortgagor. *Re Solomon and Meagher's Contract, supra.* But not so an equitable mortgagee selling under the Act of 1881. *Re Hodson and Howe's Contract* (C. A. 1887), 35 Ch. D. 668, 56 L. J. Ch. 755, 56 L. T. 837, 35 W. R. 553.

So also a mortgagee by demise of leaseholds can under Lord Cranworth's Act convey the nominal reversion in the mortgagor. *Hyatt v. Hillman* (1871), 19 W. R. 694.

By sect. 21 (7), of the Act of 1881 a mortgagee selling under the statutory power is entitled to demand the title deeds unless they are in the hands of a person having a prior estate interest or right in the mortgaged property.

Both Lord Cranworth's Act and the Conveyancing and Law of Property Act 1881 provide in effect that conveyances by mortgagees under the respective Acts shall not, in the case of copyhold or customary lands, confer the legal right to admittance, unless the deed is otherwise sufficient for that purpose.

Express powers of sale usually provide that the receipt of the mortgagee, his executors, administrators, or assigns, shall effectually discharge the purchaser from seeing to the application of the money. Provisions to the like effect were contained in section 12 of Lord Cranworth's Act, and are contained in section 22 (1) of the Conveyancing and Law of Property Act 1881.

AMERICAN NOTES.

This case is cited in 4 Kent Com., p. 147. The death of the mortgagor does not revoke a power of sale. 2 Jones on Mortgages, sect. 1792, citing the principal case: *Hunt v. Rousmanier*, 8 Wheaton (U. S. Sup. Ct.), 174; *Conners v. Holland*, 113 Massachusetts, 50; *Bergen v. Bennett*, 1 Caine's Cases (N. Y.), 1; 2 Am. Dec. 281 (a leading case, with an opinion by KENT, J.); *Hodges v. Gill*, 9 Baxter (Tenn.), 378; *White v. Stephens*, 77 Missouri, 452; *Hudgins v. Morrow*, 47 Arkansas, 515; *More v. Calkins*, 95 California, 435;

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Wilkins v. McGehee, 86 Georgia, 764; *Strother v. Law*, 54 Illinois, 413; *Collins v. Hopkins*, 7 Iowa, 463; *Berry v. Skinner*, 30 Maryland, 567 (insanity of mortgagor); *Bradley v. Chester V. R. Co.*, 36 Penn. St. 141; *Bell v. Twilight*, 22 New Hampshire, 500; *Wilson v. Troup*, 2 Cowen (N. Y.), 195; 14 Am. Dec. 458; *Beatie v. Butler*, 21 Missouri, 313; 64 Am. Dec. 234; *Pardee v. Lindley*, 31 Illinois, 174; 83 Am. Dec. 219; *Barrick v. Horner*, 78 Maryland, 253; 44 Am. St. Rep. 283.

But *contra*: *Johnson v. Johnson*, 27 South Carolina, 309; 13 Am. St. Rep. 636; *Rogers v. Watson*, 81 Texas, 400.

In *Calloway v. People's Bank*, 54 Georgia, 441, the Court said: "Our blended system of law and equity makes of a mortgage what it in fact is in practice, notwithstanding the formal rules of law. Neither this Court nor the Code has said that the mortgagee has no interest. The language is, it passes no title. This was true in equity in England, and yet a mortgagee was constantly recognized as having an interest, and an interest, too, in the land. So far as that interest was concerned, he was treated as a purchaser, and not as a general creditor, even by judgment. . . . We see nothing in this declaration of the Code, that a mortgage is only a security, that negatives the idea that a power to sell in a mortgage is a power coupled in an interest. The two ideas are just as consistent and harmonious as the idea of the English Chancery Court, as to the nature of a mortgage, was with a power of sale. Indeed, it is mainly in Chancery Courts, all of which treat a mortgage as only a security, and uniformly recognize the property to belong to the mortgagor, that the whole doctrine of powers to sell attached to a mortgage is expounded and announced."

In *McKircher v. Hawley*, *supra*, the Court said of the principal case: "After a pretty full consideration of the case, I incline to the opinion that a mortgagee of premises cannot distrain for rent accruing on a lease given by the mortgagor subsequent to the accruing on a lease given by the mortgagor subsequent to the mortgage. There is no adjudged case which countenances the contrary doctrine, and there are strong reasons against it, arising from the consideration that there is no privity or contract or estate between such mortgagee and the tenant. The mere legal ownership of the land cannot authorize either an action or a distress for the rent. The mortgagor holds, it is true, upon an implied consent and agreement, existing between him and the mortgagee; and according to the decisions of this Court, is on that principle entitled to notice to quit before he can be proceeded against as a trespasser; but it would be going too far to say, that he might make leases, which the mortgagee might or might not affirm, at his election. The relation between them does not imply a right on the part of the mortgagor to lease. Having already decided that there exists no privity between the mortgagee and one holding under the mortgagor by a conveyance subsequent to the mortgage, we have, in effect, decided the present question; for it would seem to be an incontestible proposition, that no man can distrain for rent unless a privity of contract or of estate exists between him and the party, of whom rent is claimed. The remedy by distress is a summary process given by the law, enabling the party to do himself justice, in a prompt manner. It

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will in no case lie, unless an action could be maintained for the rent : and if there be no privity of contract or estate, most certainly an action could not be maintained."

In *Bergen v. Bennett*, *supra*, KENT, J., said : "The power now in question answers exactly to this definition of a power with an interest, because the mortgagee has at the same time a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, or ever had, any estate whatsoever. I might, perhaps, rest satisfied with giving this description of the two powers, drawn from approved authority; but I think the point is susceptible of more precise and definite illustration. If a man by his will directs his executors to sell his land, this is but a bare authority without interest; for the land in the meantime descends to the heir at law, who, until the sale, would at common law be entitled to the profits; and, being but a naked authority, if one executor dies, the power at common law would not survive. Coke on Littleton, 113 a, 181 b, 236 a; 3 Salkeld's English King's Bench Reports, 277; Powell on Devises, 291-310.

"But if a man devises his land to his executors, to be sold, then there is a power coupled with an interest, for the executors in the meantime take possession of the land and of the profits. In this case, the estate, so also the trust, would survive to the surviving executor. There is a very striking analogy between this case of a devise of land to executors to be sold, and a mortgage of lands with power to sell. In both cases the estate passes to the person clothed with the power, and in both cases the power is given to answer a specific purpose. I cannot discern any distinction between the cases sufficient to render the power in the one instance naked, and in the other coupled with an interest. It is not a power with interest in the executors, because they may derive a personal benefit from the devise: for a trust will survive, though no ways beneficial to the trustee. It is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest in question; and where an executor, guardian, or other trustee is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. It has been thus frequently adjudged. This case also is still more analogous to the one of a conveyance of property by way of pledge, or in trust with an agreement for the mortgage to sell in case of default. This is a practice known in the English law, and it was taken for granted by the LORD CHANCELLOR in the case of *Tucker v. Wilson*, 1 Peere Williams, 261, that where there existed such an agreement, the mortgagee might sell after the death of the mortgagor. It seems to have been admitted, not to have been competent for the mortgagor to revoke this authority to sell, because it was granted for the benefit of the mortgagee. He might perhaps embarrass the execution of the power by a subsequent mortgage or judgment, but the power would still remain in full force, although the land in the hands of the purchaser under the power might become subject to such subsequent lien. In short, this power is altogether different from that of a mere naked authority; the latter is no better than a letter of attorney given to a stranger to the estate, as in the instance given by

No. 47. — *Corder v. Morgan.* — Notes.

Coke of a letter of attorney to make livery of seisin : 1 Institutes, 52 b. This is revocable by the grantor at his pleasure in his lifetime, and is absolutely revoked by his death. The grantee of such a naked power, having no interest connected with the power, has, of course, no interest affected by the revocation. The present power is in every view distinct from the other. I conclude, therefore, that the power to sell was not revoked by the death of the mortgagor, and that the decree cannot be supported on the ground that was taken in the Court below. I have bestowed some pains upon this question, because I am of opinion that the grounds of a definitive decree in chancery, resting upon what is assumed to be a principle of law, ought not to be questioned and overturned without much care and consideration."

In *Johnson v. Johnson*, *supra*, the Court said: "The power of one man to act for another must depend on the will of that other, and when it is withdrawn the power ceases. As the power of sale in this case formed a part of a contract for consideration, it may be conceded that it could not have been revoked in the lifetime of the creator of it; but, nevertheless, we think it was revoked by his death. It certainly was, unless it belonged to that exceptional class where the 'power is coupled with an interest.' *Hunt v. Rousmanier Admrs*, 8 Wheaton, 205; *Lockett v. Hill*, 1 Woods, 558, and cases there cited. Was the power here, in the sense of the rule, 'coupled with an interest'?"

"I freely confess that the phrase, 'a power coupled with an interest,' never seemed to me to convey a very clear and definite idea. I am content to adopt the views of Chief Justice MARSHALL upon the subject, as expressed in the case from Wheaton above cited, where he says: 'What is meant by the expression "a power coupled with an interest"?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the "interest" which protects a power after the death of the person who creates it, must have an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing. If we are to understand by the word "interest" an interest in that which is to be produced by the execution of the power, then they are never united; the power, to produce the interest, must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be "coupled" with it. But the substantial basis of the opinion of the Court on this subject is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such case is the act of the principal, to be legally effectual, must be in his name — must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it,' &c.

"We are aware that Mr. Jones (2 Mortgages, sect. 1794) has expressed the opinion that 'the rule is the same in those States where, by statute, or adjudication, a mortgage is regarded as a mere security for debt, passing no title or estate to the mortgagee; the power of sale is coupled with an interest, and

No. 48. — Warner v. Jacob, 20 Ch. D. 220. — Rule.

is irrevocable, just the same as it is where the common law doctrine, that the mortgage conveys the legal estate, still prevails.' — and cites as authority for the proposition the case of *Calloway v. People's Bank of Bellefontaine*, 54 Georgia, 441. But as the learned author in the same book repeatedly declares that the deed of sale under the power should be made by the holder of the legal title, we must suppose that he failed to note clearly the great difference as to title between common law mortgage and one executed under a statute such as that in this State."

No. 48. — WARNER v. JACOB.

(1882.)

RULE

A MORTGAGEE exercising his power of sale is not a trustee for the mortgagor, except as regards the surplus proceeds of sale after his own claims are satisfied.

Warner v. Jacob.

20 Ch. D. 220-224 (s. c. 51 L. J. Ch. 642; 46 L. T. 656; 30 W. R. 721).

[220] *Mortgage. — Power of Sale. — Redemption. — Restraining Sale. — Undervalue. — Trustee.*

If a mortgagee exercises his power of sale *bonâ fide* for the purpose of realising his debt and without collusion with the purchaser, the court will not interfere even though the sale be very disadvantageous, unless the price is so low as in itself to be evidence of fraud.

A mortgagee in exercising his power of sale is not (except as to the balance of the purchase-money after a sale) a trustee for the mortgagor even if the mortgage is in the form of a trust for sale.

By an indenture of mortgage dated 5th of June, 1879, J. Warner, in consideration of £3500 advanced to him, mortgaged certain hereditaments in Clerkenwell (to which he was entitled under a building agreement) to W. Jacob and J. W. Sherriff, the trustees of the Royal Benefit Building Society, by way of security for the payment of all moneys due from Warner according to the regulations of the building society. The deed contained a power of sale in the usual form. Warner found difficulties in obtaining a lease under his building agreement

and became in arrear with his payments to the building society, who, on the 28th of May, 1880, took possession and incurred considerable expenses in connection therewith. On the 23rd of October the trustees of the building society gave notice to Warner that they intended to sell, and on the 8th of November they contracted to sell to T. L. Boyd for £5500. On the 19th of January, 1881, Warner brought this action against the trustees of the building society and against Boyd, the purchaser, alleging that he, Warner, was only temporarily in difficulties, and could have borrowed money to pay off the society; that he hoped to obtain a lease which would increase the value of the property, and that the sale was at an undervalue and made for the purpose of embarrassing him; and that the agreement with Boyd was not binding, and claiming redemption and damages. The trustees of the society denied that the sale * was at an [* 221] undervalue or made for any purpose except that of realising; and Boyd denied all knowledge of anything else. Witnesses were examined, and a long correspondence was put in. The effect of the evidence appears from the judgment of the Court.

W. Barber, Q. C., and P. Beale, for the plaintiff.

Rigby, Q. C., and Speed, for the trustees of the building society.

Higgins, Q. C., and Maidlow, for the purchasers.

March 9. KAY, J. :—

The action in this case is by a mortgagor against the mortgagees and a purchaser from them under their power of sale, asking to have the sale set aside, and for the usual decree for redemption.

A question has been raised as to the position of a mortgagee exercising his power of sale; upon which it is well to look back to the authorities. Sir T. PLUMER, in *Cholmondeley v. Clinton*, 2 J. & W. 1 (22 R. R. 84), says (2 J. & W. 183): "It is only in a secondary point of view and under certain circumstances and for a particular purpose that the character of trustee constructively belongs to a mortgagee. No trust is expressed in the contract; it is only raised by implication in subordination to the main purpose of it, and after that is fully satisfied; its primary character is not fiduciary." And (2 J. & W. 184) "The ground on which a mortgagee is in any case, and for any purpose, considered to have a character resembling that of a trustee is the partial and limited right which in equity he is allowed to have in the whole estate legal and equitable. He does not at any time possess,

like a trustee, a title to the legal estate distinct and separate from the beneficial and equitable. Whenever he is entitled at all to either, he is fully entitled to both; . . . but in equity his title is confined to a particular purpose. He has no right to either, nor can make use of any remedy belonging to either, further than and as may be necessary to secure the repayment of the money due to him. When that is paid his duty is to reconvey the estate to the person entitled to it; it never remains in [*222] his *hands clothed with any fiduciary duty. . . . The mortgagee is a mere indifferent stakeholder. The real contest lies between the competitors for the estate, which in the hands of either must continue subject to the mortgage till paid off; when paid off, the mortgage title ends, and then, and not before, the implied trust to surrender the estate to the person entitled to demand it begins."

In *Matthie v. Edwards*, 2 Coll. 465, the Vice-Chancellor KNIGHT BRUCE set aside a sale by mortgagees, but his decision was reversed by Lord COTTENHAM, who, in *Jones v. Matthie*, 11 Jur. 504, is reported as having said: "Such a power as this may, no doubt, be used for purposes of oppression, but when conferred it must be remembered that it is so by a bargain between one party and the other, and it is for the party who borrows to consider whether he is not giving too large a power to him with whom he is dealing. If the power is exercised for fraudulent purposes this Court will interfere, and as in other cases, if the party actually deposits in Court the amount due, it will not allow the power to be exercised at all." In *Dacey v. Durrant*, 1 De G. & J. 535, 557, Lord Justice TURNER said: "The case made by the bill, and attempted to be made at the bar, as to the sale to the defendant Packe is this: that the sale was upon terms not warranted by the power of sale vested in the defendant Durrant; that the price was grossly inadequate, so much so indeed as to amount to evidence of fraud; that the notice, which was the necessary preliminary to the sale, had become ineffectual and had been waived, and that the proper steps had not been taken for securing an advantageous sale. With many of these objections the defendant Packe, as I apprehend, has no concern whatever. I agree that he was bound to see that the terms of the sale fell within the limits of the power, and of course he could not maintain a purchase made at a fraudulent undervalue; but except in these respects

I apprehend that he cannot be affected. By the terms of the deed creating the power of sale he was absolved from inquiring whether the power had arisen; and I cannot go the length of holding that in the absence of fraud or collusion, a purchaser from a mortgagee with a power of sale is bound to inquire what steps have been antecedently taken for the purpose of promoting the sale."

* In *Adams v. Scott*, 7 W. R. 213, a demurrer was [*223] allowed by Vice-Chancellor WOOD to a bill alleging a contract by the mortgagees for the sale of a mortgaged estate at the price of £12,000, the estate being alleged to be worth £20,000 to £25,000. The VICE-CHANCELLOR said that it was clear that the exercise of the power of sale could not be suspended by filing a bill to redeem. "The plaintiff was bound to have shown that the power, the existence of which he stated in his bill, had been exercised improperly or contrary to its terms, that there had been some fraud attending the sale, and that the purchasers had notice of such fraud."

Besides these authorities there are the well-known cases of *Kirkwood v. Thompson*, 2 H. & M. 392, supported by *Locking v. Parker*, L. R. 8 Ch. 30, and *In re Alison*, 11 Ch. D. 284, which have decided that even if the mortgage is in the form of a trust for sale, that is not a trust which the mortgagor can enforce and the mortgagee is not thereby made a trustee for the mortgagor.

Reliance was placed on the language of Vice-Chancellor STUART in *Robertson v. Norris*, 1 Giff. 421, 424, where he states that Lord ELDON had said that the mortgagee was a trustee for the mortgagor in the exercise of that power. The whole passage is this: "Lord ELDON says that the mortgagee is a trustee for the benefit of the mortgagor in the exercise of that power. That expression is to be understood in this sense, that the power being given to enable him to recover the mortgage money, this Court requires that he shall exercise the power of sale in a provident way, with a due regard to the rights and interests of the mortgagor in the surplus money to be produced by the sale. The legitimate purpose being to secure repayment of his mortgage money, if he uses the power for another purpose — from any ill motive to effect other purposes of his own or to serve the purposes of other individuals — the Court considers that to be a fraud in the exercise of the power, because it is using the power for purposes foreign to that for which it was intended." The reference is to *Downes v. Glazebrook*, 3 Mer. 200 (17 R. R. 62), but that case only decided that where the

mortgage was in the form of a trust for sale the mortgagee could not buy.

[* 224] * The result seems to be that a mortgagee is, strictly speaking, not a trustee of the power of sale. It is a power given to him for his own benefit, to enable him the better to realise his debt. If he exercises it *bond fide* for that purpose, without corruption or collusion with the purchaser, the Court will not interfere even though the sale be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

His Lordship then stated the facts of the case, and read the correspondence between the parties and commented on the evidence. His Lordship then said: On the 19th of January, 1881, the writ in this action was issued, no tender of the mortgage money having been made, nor any attempt to stay the sale by injunction, which, according to the authorities I have cited and to *Whitworth v. Rhodes*, 20 L. J. Ch. 105, could only have been done by paying the money into Court. It is obvious from the evidence that the plaintiff was quite unable to do this or to pay off the principal or the arrears of interest, unless he obtained the lease and a new mortgage, as he hoped to do. But the mortgagees were under no obligation to wait for this, and had a perfect right to exercise their power of sale to realise their debt. They proposed to sell with his concurrence, but as he declined to concur they sold without it.

His Lordship then commented on the evidence as to undervalue, coming to the conclusion that no case of undervalue was made out, and that no doubt under the circumstances the sale to Boyd was the best thing the society could do. There was no evidence of any *mala fides* or collusion. The sale to Boyd could not be set aside, nor was there any case for damages in respect of the sale. So far as the action sought to effect the sale, it must be dismissed with costs as against Boyd and as against the mortgagees. There must be the usual accounts in a redemption suit as against mortgagees in possession, and the purchase-money would come into that account.

ENGLISH NOTES.

It is well settled that a mortgagee having a power of sale, provided he acts *bond fide* and takes reasonable precautions to obtain a proper price, has a perfect right to realise his security by sale in such manner

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as he thinks most conducive to his own benefit. *Farrar v. Farrar's Limited* (C. A. 1888), 40 Ch. D. 395 at p. 411, 58 L. J. Ch. 185, 60 L. T. 121, 37 W. R. 196.

“A mortgagee is not a trustee of a power of sale for the mortgagor at all; his right is to look after himself first. But he is not at liberty to look after his own interests alone, and it is not right or proper, or legal, for him, either fraudulently or wilfully or recklessly to sacrifice the property of the mortgagor — that is all.” Per LINDLEY, L. J., in *Kennedy v. De Trafford* (C. A.), 1896, 1 Ch. 762 at p. 772, 65 L. J. Ch. 465, 74 L. T. 599, 44 W. R. 454.

Express powers of sale usually contain a provision protecting a mortgagee from liability for loss occasioned by the exercise of the power, and section 21 (6) of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c. 41) contains a provision to the like effect.

The sale may be either by public auction or private contract, unless the terms of the power prescribe a particular mode of sale. *Bousfield v. Hodges* (1863), 33 Beav. 90; 23 & 24 Vict., c. 145, s. 11; 44 & 45 Vict., c. 41, s. 19 (1).

A mortgagee selling under his power is under no obligation to advertise the sale. *Davey v. Durrant* (1857), 1 De G. & J. 535.

Though a mortgagee can generally sell the whole or any part of the mortgaged property, he cannot except with the sanction of the Court sell the land apart from the timber, or the surface apart from the minerals, or trade machinery apart from mortgaged lands. *Cholmeley v. Paxton* (1825), 3 Bing. 207, 28 R. R. 619; *Re Beaumont's Mortgaged trusts* (1871), L. R. 12 Eq. 86, 40 L. J. Ch. 400, 19 W. R. 767; *Re Yates, Batchelor v. Yates* (C. A. 1888), 38 Ch. D. 112, 57 L. J. Ch. 697, 59 L. T. 47, 36 W. R. 563.

A mortgagee may sell under special conditions even of a stringent character, if not unreasonably depreciating. *Hobson v. Bell* (1839), 2 Beav. 17.

Though the Court will not generally interfere to restrain a sale by a mortgagee under his power, yet, if it be clearly shown that the mortgagee is intending to exercise his power corruptly or in collusion with the purchaser or with such reckless want of care and diligence as to amount to fraud, the mortgagee may be held liable in damages for the full value of the property sold. *National Bank of Australasia v. United Hand in Hand, &c. Co.* (1879), 4 App. Cas. 391. So also the mortgagee will be liable in damages if he exercises the power oppressively and unreasonably. *Moore v. Shelley* (1883), 8 App. Cas. 285, 52 L. J. P. C. 35, 48 L. T. 918. In some cases where the mortgagee has acted fraudulently or oppressively to the knowledge of the purchaser the sale has been set aside.

No. 49. — *Tanner v. Heard*, 23 Beav. 555. — Rule.

Robertson v. Morris (1858), 4 Jur. (N. S.) 443; *Jenkins v. Jones* (1860), 2 Giff. 99, 29 L. J. Ch. 493, 8 W. R. 270.

Where it is shown that a mortgagee intends to exercise his power of sale improperly an injunction may be granted to restrain the sale. *Whitworth v. Rhodes* (1850), 20 L. J. Ch. 105.

A mortgagee selling under his power is not allowed to purchase the mortgaged property either directly or through the intervention of a trustee or agent. *Downes v. Grazebrook* (1817), 3 Mer. 200, 17 R. R. 62; *Henderson v. Astwood* (P. C.) 1894, A. C. 150.

So also a person who has acted as agent for the mortgagee in the mortgage transaction cannot purchase on a sale by the mortgagee. *Orme v. Wright* (1839), 3 Jur. 19; *Martinson v. Clowes* (1882), 21 Ch. D. 857, 51 L. J. Ch. 594, 46 L. T. 882, 30 W. R. 795. But there is no objection to a *bonâ fide* sale by a mortgagee to a company in which he is a shareholder. *Farrar v. Farrar's Limited*, *supra*.

AMERICAN NOTES.

Principal case cited in 2 *Jones on Mortgages*, sect. 1802. In this country the ordinary provision or practice is to require the surplus money to be paid into Court.

No. 49. — *TANNER v. HEARD*.

(1857.)

RULE.

ON a sale of mortgaged property under an express or statutory power, the mortgagee becomes a trustee for the mortgagor or other the persons interested in the equity of redemption of the surplus proceeds of the sale after retaining thereout the amount of principal, interest, and costs.

Tanner v. Heard.

23 Beavan, 555-558 (s. c. 3 Jur. (N. S.) 427).

Sale by Mortgagee. — Trust of Surplus Proceeds.

[555] A., the first mortgagee of a ship, with the sanction and authority of B., the second mortgagee, sold it and received the proceeds, which exceeded the amount due to him. *Held*, that A. was accountable to B. in the character of trustee, and A. having insisted that there was a deficiency, and having neglected to account, and a balance having been found against A., in a suit by B., *held*, that A. ought to pay the costs of the suit. B., however, had made charges, in which he failed, and the Court therefore gave neither party costs.

No. 49. — *Tanner v. Heard*, 23 Beav. 555-557.

In 1851, Richard Richards, the owner of a ship, mortgaged it to Richard Heard, and in 1853 he mortgaged it to the plaintiff Tanner.

The mortgagor attempted to sell the ship and obtain the produce, but Heard caused it to be arrested at Amsterdam, and it was sold in May, 1854, under powers of attorney, given by Heard and Tanner, and the produce, after payment of the expenses, was received by Heard.

* On the 15th of June, 1854, the plaintiff applied for an [* 556] account of the proceeds of the sale, which was promised by the defendant, as soon as he had got his papers, but, he added, that there had been a deficiency of £74.

The plaintiff made other applications for the account, and on the 17th of July he threatened legal proceedings. None having been furnished, the plaintiff filed the present bill on the 25th of November, 1854, for an account of the produce of the ship, and for payment to him of the surplus.

The plaintiff by his bill insisted, that the defendant was also liable to account for stores belonging to the ship and included in his security of the value of £120, which, he alleged, the defendant had improperly allowed the mortgagor to take possession of and appropriate to his own use. In this contention, however, the plaintiff failed.

By the decree, accounts and inquiries were directed, and before the chief clerk the defendant claimed a balance of £100 11s. 1d. to be due to him on his mortgage; but the chief clerk found that the defendant had been fully paid, and that a balance of £105 was due from him.

The defendant now moved to vary the chief clerk's certificate.

Mr. R. Palmer and Mr. Karslake, for the plaintiff.

Mr. Selwyn and Mr. Osborne, for the defendant.

* *Attorney-General v. The Brewers' Company*, 1 P. Wms. [* 557] 376; *Griffiths v. Lewis*, 2 Bro. P. C. 407; *Loftus v. Swift*, 2 Sch. & Lef. 642, were cited.

The MASTER OF THE ROLLS (Lord ROMILLY).

The question in this case is, as to costs, which are claimed by both sides. The defendant says, he is first mortgagee, that this is a bill to redeem, and that, on established principles, the first mortgagee is entitled to principal, interest, and costs in the first place.

The plaintiff says, that the mortgage is paid off, that the defendant is a trustee for him of the surplus, that the ship was sold on behalf of both parties, that a balance has been found against the defendant in taking the accounts, and that, consequently, the costs ought to abide the result. I am of opinion that this is not a case in which the principles which obtain in a suit between mortgagees are applicable; I think it distinguishable. It is a case of this description: The defendant was first mortgagee of a ship, the plaintiff was the second. The defendant, with the sanction and authority of the plaintiff, sold it at Amsterdam, and received the proceeds of the sale. Being entitled, in the first place, to the amount due on his mortgage and the expenses of the sale of the ship, and there being a surplus, he was bound to account to the plaintiff in the character of trustee. The question then is, in what manner I must dispose of the costs. Considering this to be the character of the suit, I am bound to look into what are the facts and what is the result of the contention on both sides.

The plaintiff puts forth prominently by the bill, and [*558] *insists, that there were stores belonging to the ship, which Richard Richards, the mortgagor, had been improperly allowed by the defendant to retain, and this matter being brought forward by the plaintiff, as one of those grounds on which the defendant ought to account for these matters, the result of the inquiry turns out to be in favour of the plaintiff. The only argument of the plaintiff now is, that there was reasonable ground for bringing forward that case. It may be so, — on that I express no opinion, — but the defendant, having succeeded in it, would be entitled to the costs of that contention; it was a serious charge, and in respect of it he stands exonerated.

On the other side, the defendant is called on to account for the produce of the ship; he does not refuse, but says he is ready when he gets the papers from Amsterdam, and four months after the last application the bill is filed. Before the bill was filed the defendant says, "You take this account at your own risk; there is a balance of £74 due to me." The accounts are brought in and a claim is made by the defendant of a balance of £100. On taking the accounts, the chief clerk, who has dealt very liberally, found £100 due from him. The result as to this is, that the defendant claimed what he was not entitled to, and he would have to pay the costs of taking the account; that is the ordinary result.

On the whole, I shall give no costs of the suit to either side. The defendant must pay the balance found due from him, which is £105, and the defendant must pay the costs of the motion to vary the chief clerk's certificate, in which he has failed.

ENGLISH NOTES.

Express powers of sale generally contain provisions to the same effect as the rule above stated, and both Lord Cranworth's Act and the Conveyancing and Law of Property Act 1881 contain provisions as to the application of the purchase money.

A mortgagee exercising his power of sale is entitled to retain out of the proceeds of sale all arrears of interest owing to him without regard to the six years imposed by the Statute of Limitations (3 & 4 Will. IV., c. 27), s. 42, even though the purchase money has been paid into Court. *Edmunds v. Waugh* (1866), L. R. 1 Eq. 418, 35 L. J. Ch. 234; *Re Marshfield*, *Marshfield v. Hutchings* (1887), 34 Ch. D. 721, 56 L. J. Ch. 599, 56 L. T. 694, 35 W. R. 491.

The costs to which a mortgagee is entitled include the costs of and incident to the sale, and also the costs of an abortive attempt to sell. *Farrer v. Lacey Hartland, &c. Co.* (C. A. 1885), 31 Ch. D. 42, 55 L. J. Ch. 149, 53 L. T. 515, 34 W. R. 22.

If after satisfying what is due to the mortgagee for principal, interest, and costs, any surplus proceeds of sale remain in his hands, he will be a trustee of that surplus; and he will accordingly be liable if he pays the surplus to a wrong person. *West London Commercial Bank v. Reliance Permanent Building Society* (C. A. 1885), 29 Ch. D. 954, 54 L. J. Ch. 1081, 53 L. T. 442, 33 W. R. 916.

In order to render a mortgagee liable as trustee of surplus proceeds of sale it must be proved that there was a surplus, and no evidence of that fact can be adduced if more than six years elapsed since the time of sale. *Locking v. Parker* (1872), L. R. 8 Ch. 30, 42 L. J. Ch. 257, 27 L. T. 635, 21 W. R. 113; *Banner v. Berridge* (1881), 18 Ch. D. 254, 50 L. J. Ch. 630, 44 L. T. 680, 29 W. R. 844.

Where the mortgagee is in doubt as to the persons entitled to receive the surplus proceeds of sale, he is justified in taking out an originating summons to have the point determined. *Re Cook's Mortgage*, *Lawledge v. Tyndall*, 1896, 1 Ch. 923, 65 L. J. Ch. 654, 74 L. T. 652, 44 W. R. 646. Or in such a case the mortgagee may pay the money into Court. *Roberts v. Ball* (1855), 24 L. J. Ch. 471.

Unless he does one or the other, it is his duty to set apart and invest the money for the benefit of the persons who may establish their claim to it; if he neglects to do so, he will be charged with interest at 4 per

No. 50. — **Burt, Boulton and Hayward v Bull**, 1895, 1 Q. B. 276. — Rule.

cent per annum as from the completion of the sale. *Charles v. Jones* (1887), 35 Ch. D. 544, 56 L. J. Ch. 745, 56 L. T. 848, 35 W. R. 645.

AMERICAN NOTES.

If the mortgagee retains the surplus, he is liable for interest. *Mattel v. Conant*, 156 Massachusetts, 418; *Allen v. Allen*, 12 Rhode Island, 301; *White v. Dougherty*, 1 Martin & Yerger (Tennessee), 309; 17 Am. Dec. 802.

No. 50. — BURT, BOULTON AND HAYWARD *v.* BULL.

(C. A. 1894.)

RULE.

THE nature of the office of a receiver appointed under a power in a mortgage deed or under a statutory power, and the extent of his powers, are very different from those of a receiver appointed by the Court. The former derives his authority wholly from the deed appointing him, and he cannot go beyond the powers given to him by that deed or by law. The latter is an officer of the Court, and is accordingly protected by the Court in the exercise of the powers conferred upon him.

Burt, Boulton and Hayward v. Bull and another.

1895, 1 Q. B. 276–285 (s. c. 64 L. J. Q. B. 232; 71 L. T. 810; 43 W. R. 180).

[276] *Principal and Agent. — Receiver and Manager appointed by the Court, Personal Liability of on Contracts. — Construction of Order for Goods signed by Receiver and Manager as such.*

The defendants, who were receivers and managers of the business of a company appointed by the Court, gave an order to the plaintiffs for goods required for the purposes of the business. The order, which was in writing signed by the defendants, was expressed to be given for the company, and the words “receivers and managers” were appended to the signatures of the defendants: —

Held, that, when receivers and managers of a business appointed by the Court order goods for the purposes of the business, the inference *primâ facie* is that they pledge their personal credit for the goods, looking for indemnity to the assets of the business; that there was nothing in the terms of the above-mentioned order to rebut that inference; and that therefore the defendants were personally liable for the price of the goods.

Appeal from the judgment of MATHEW, J., at the trial of the action without a jury.

No. 50. — *Burt, Boulton and Hayward v. Bull*, 1895, 1 Q. B. 276, 277.

The action was for the price of timber supplied by the plaintiffs to the defendants. The facts were as follows:—

A company called Joseph Bull, Sons & Co., Limited, carried on the business of builders and contractors, the defendant Bull being the managing director of the company. The company had issued mortgage debentures. In May, 1892, the assets of the company consisted of moneys to be received under certain building contracts with the London School Board, contractors' plant, stock-in-trade, and certain book debts. The contracts with the School Board provided for the retention of 10 per cent of the price of the work until completion, and that, if the work were not proceeded with at such a rate as the School Board architect thought sufficient, the Board could take over the contract and complete the work. A debenture-holders' action had been brought in the Chancery Division, in which the defendant Bull and one Bird were appointed receivers and managers of the business of the company, with liberty to raise a sum of £1000 on the security of the assets of the company in priority to * the securities of the [* 277] debenture-holders. An order was subsequently made in this action giving the managers power to raise a further sum of £4000 as a first charge on the assets of the company other than the property comprised in certain specific charges. Certain unsecured creditors of the company then presented a petition for the winding up of the company. No order for winding up the company was however made, but an arrangement was come to, by which an order was made by consent that second debentures should be issued to the unsecured creditors of the company to secure the amounts due to them, and one Hobbs should be appointed a receiver and manager in the place of Bird on their behalf. It was further arranged that the sum of £5000 which the receivers and managers were empowered to raise should be advanced by the unsecured creditors and one of the debenture-holders in certain proportions. It appeared that Boulton, one of the members of the plaintiffs' firm, who were unsecured creditors of the company, was a member of a committee, appointed by a meeting of the unsecured creditors, under whose direction the proceedings on behalf of the unsecured creditors were carried on, and that he was aware of the nature of the arrangements come to in the course of those proceedings. Ultimately the defendant Ward, who was a chartered accountant, was appointed by the Court to act as re-

receiver and manager of the business of the company, jointly with the defendant Bull, on behalf of the unsecured creditors, in the place of Hobbs. The defendants, in the course of carrying on the business of the company, subsequently gave the plaintiffs an order for the timber for the price of which the action was brought. The order which was in writing was signed as follows: "For Joseph Bull, Sons & Co., Limited. Receivers and Managers, Edward C. Bull and Robert Jas. Ward." The learned Judge gave judgment for the plaintiffs for the amount claimed.

Farwell, Q. C., and Beven, for the defendant Bull. The order for the goods in this case does not purport to be given by the defendants in their individual capacity. It states that it is given by them for the company in their capacity as receivers and managers of the company. It is contended that the words * of the order import that the defendants were not giving the order as individuals on their own personal credit, but in the capacity of managers appointed by the Court. The question is whether, having regard to all the circumstances of the case, the true inference is that the defendants intended to pledge, and the plaintiffs supplied the goods on the personal credit of the defendants, or that the plaintiffs were really content to supply the goods, looking for payment to the fund of £5000 provided for by the order of the Court and the assets of the business. One of the members of the plaintiffs' firm was a member of the committee appointed on behalf of the unsecured creditors of the company, and was cognisant of the proceedings in reference to the appointment of the receivers and the raising of a fund of £5000. It is clear that it was supposed to be in the interest of all the creditors that provision should be made for carrying on the contracts with the School Board, and so earning the retention moneys under those contracts. Under those circumstances the proper inference is that the plaintiffs were content to look to the fund of £5000 and the assets of the company for payment; and that the defendants never intended to pledge, and the plaintiffs never supposed them to be pledging, their personal credit. A receiver and manager appointed by the Court is not bound to pledge his personal credit for the purpose of carrying on the business, and there is no presumption that he intends to do so, when he gives an order. In cases where a trustee or official has the assets of the concern vested in him, the presumption may be that he is intended to pledge

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his personal credit; but where he has no assets vested in him it is otherwise. See *Redpath v. Wigg* L. R. 1 Ex. 335, where inspectors under an inspectorship deed were held not personally liable. [They also cited *Taylor v. Neate*, 39 Ch. D. 538; *In re Anglo-Moravian Hungarian Junction Ry. Co., Ex parte Watkin*, 1 Ch. D. 130.]

Upjohn, for the defendant Ward, cited *Sargent v. Reed*, 1 Ch. D. 600.

Lawson Walton, Q. C., and C. A. Russell, for the plaintiffs. The learned Judge has found on ample materials that in point of fact the defendants intended to pledge and the plaintiffs trusted to * the defendants' personal credit. It is in each [* 279] case a question of fact whether that was so, except in so far as the construction of a document may be concerned. But there is nothing on the face of the order in this case that imports that the defendants were not pledging their personal credit. The mere description of themselves as receivers and managers cannot have that effect. It is clear from the language of JESSEL, M. R., in *Sargent v. Reed*, 1 Ch. D. 600, and that of CHITTY, J., in *Taylor v. Neate*, 39 Ch. D. 538, that they both contemplated that receivers and managers appointed by the Court must pledge their personal credit on the contracts reasonably necessary for carrying on the business.

Farwell, Q. C., in reply.

LORD ESHER, M. R. The action was for goods sold and delivered upon the order of the defendants, who were receivers and managers appointed by the Court to manage the business of a company. What is the position of such a receiver and manager? He is not the agent of the company. They do not appoint him; he is not bound to obey their directions; and they cannot dismiss him, however much they may disapprove of the mode in which he is carrying on the business. Only the Court can dismiss him, or give him directions as to the mode of carrying on the business, or interfere with him, if he is not carrying on the business properly. The incidents of his relation to the Court are such as would, if they existed as between him and an ordinary person, constitute him an agent for such person; but it is of course impossible to suppose that the relation of agent and principal exists between him and the Court. What is the inference that necessarily arises? It must be that the intention is that he shall act in pursuance of his appointment on his own responsibility

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and not as an agent, because otherwise nobody will be responsible for his acts. The company cannot be liable, for he is not their agent, and the Court clearly cannot be liable. Therefore any orders which he may give under such circumstances as manager must *primâ facie* be taken to be orders given on his own responsibility and credit. How far he may be bound to give such orders [* 280] it is not now necessary to determine. It may * be that, if his relation to the Court implies that he must within the bounds of reason carry on the business, as between him and the Court, it would be his duty to give the necessary orders; but I apprehend that, if he finds himself thereby placed in a difficulty, and is unwilling to give orders, he may apply to the Court and the Court would protect him. One would hardly require any particular authority for a doctrine with regard to the position of a manager appointed by the Court that seems to be the inevitable inference from the nature of the case; but, if any were wanted I think that the observations of JESSEL, M. R., in *Sargant v. Reed*, 1 Ch. D. 600, show that he thought that what I have stated in relation to the position of a receiver and manager appointed by the Court had been so often proved to be the fact that the Court would take judicial cognisance of it. I think also that the effect of what CHITTY, J., stated in *Taylor v. Neate*, 39 Ch. D. 538, is the same. When he said in that case that, where the Court appoints a manager of a business, he must necessarily make what the learned Judge calls "subordinate contracts," I think he meant contracts by which he pledged his own credit. I think, therefore, that that is the position which a manager appointed by the Court accepts when he undertakes the management of a going business. But when the question is as to his liability as between himself and a third person, one must look at that person's position too. If it can be shown that the third person accepted an order on the terms that the manager should not be personally liable; if, for instance, the manager went to a tradesman and stated that he was a manager appointed by the Court, and that he could not give him an order in the ordinary way, pledging his own credit, but only on the terms that he should be paid, if the assets of the business proved sufficient, of course the tradesmen could not afterwards turn round and say that he supplied the goods on the manager's personal credit. Therefore there might be cases in which such a manager would not be personally liable; but, if there is no special stip-

ulation of that kind, and if the terms of the order merely amount to a statement that the giver of it, being a manager appointed by the Court, gives such an order, then I think the only business * inference is that the tradesman is to look to the [* 281] personal credit of the manager, and that the manager trusts to the funds in hand or the other assets of the concern for indemnity. The consequences of the opposite view appear to me to be so serious that no Court, having regard to the exigencies of business, would accept it, unless they were absolutely obliged to do so by authority; for the result would be that no tradesman could safely deal with such a manager without inquiring as to the existence of a fund to which he might look, whether, if such a fund existed, it was not subject to other liabilities, and whether the business was being carried on by the manager at a profit; and the same thing might apply to the servants employed in the business. We have therefore to consider the order here given, and what took place with regard to it, in order to see whether it imported that the plaintiffs were not to look to the defendants' personal credit. The order was signed: "For Joseph Bull, Sons & Co., Limited. Receivers and Managers, Edward C. Bull and Robert Jas. Ward." The order cannot be taken to mean that it was given for the company as principals; that was not true, because the defendants were not the agents of the company, and, if that was the meaning, they would be liable on an implied warranty of authority for damages equivalent to the price of the goods. If the word "manager" had been used alone, it might in business parlance be taken to indicate an agent; but the words are "receivers and managers," which do not, as it seems to me, import managers appointed by the company. That is legal phraseology, and would, I think, suggest to the other party that the defendants were receivers and managers appointed by the Court. So the terms of the order amount only to a statement that the defendants are receivers and managers appointed by the Court, and that being such they give the plaintiffs the order. It seems to me that the parties receiving such an order must know that they could not go to the Court for payment, and therefore they would supply the goods on the personal credit of those giving the order. The question whether credit was given to the defendants personally is really one of fact, depending on the circumstances of each case, because there might be circumstances which

would take the case out of the general rule which [* 282] * I have laid down. The Judge in this case has found that the case falls within the ordinary rule, and that the defendants intended to pledge and the plaintiffs to trust to the defendants' personal credit. I cannot say that his finding was wrong — indeed, I agree with it. For these reasons the appeal must be dismissed.

LOPES, L. J. — The Judge found that the defendants, who were receivers and managers appointed by the Court, had made themselves personally liable. In my opinion the question involved in this and similar cases must be one of fact — viz., on what credit the goods were supplied in the particular case. The goods must be presumed, I think, in the absence of a clear agreement to the contrary, to have been supplied on the credit of some one. On whose credit could they have been supplied in this case, if not the defendants' ? It was argued that the defendants had only given the order as agents. But the company after their appointment had no control over the business: it could give no orders and make no contracts. The defendants could not be said to be agents for anybody. They had the sole control of the business, subject to the directions of the Court. They gave the order as receivers and managers appointed by the Court to the plaintiffs, who knew the position of the company and that of the defendants. Under these circumstances, in my opinion, the goods must be taken to have been supplied on the credit of the defendants. It was urged that it was very hard to make receivers and managers personally liable. The answer to that argument appears to be that they have ample opportunity of protecting themselves, if they take the proper course. If they find that they have no funds to meet orders, I presume they need not give them; or, if they give orders, they may give them in such a form and on such terms as to exclude personal liability on their part. I cannot help thinking that what the defendants thought was that there were assets which would come to their hands, and to which they might look for indemnity, and that they intended, on giving the order, to incur personal liability. I think the conclusion of the learned Judge was the right one. It is enough to [* 283] say that it was not wrong; but I go further than * that, for I think that under the circumstances I should have arrived at the same conclusion myself.

RIGBY, L. J. — It appears to me that the words “ receivers and managers ” appended to the defendants’ signatures in the order were sufficient to put the plaintiffs on inquiry as to what that expression actually imported. If it really imported that they were merely servants or agents of a firm or some other persons, it might be unfortunate for parties who acted on the order without such inquiry. A case of *Owen & Co. v. Cronk* [1895], 1 Q. B. 265, recently came before the Court in which the facts were somewhat similar to those of the present case: but it appeared there that the persons described as receivers and managers were known to be agents of known principals, and we held that the defendants, who had professed to act as agents only, were not liable as principals where other principals were in existence. In this case the plaintiffs either knew already, or would have ascertained on inquiry, that the defendants were not agents in the proper sense for any individual person or company, but had been appointed in an action brought by debenture-holders in the Chancery Division to do what was supposed to be for the benefit of all concerned — viz., carry on an existing business. To induce them to accept that office a fund was provided, to which they might look for indemnity. Relying on that fund, as it seems to me, and apparently induced in the case of one of them by the expectation of professional profit, and in the case of the other by the interest which he had in the matter, they undertook the position of managers. I do not propose to express in detail my views as to the position of receivers and managers appointed by the Court to carry on a business; but, according to my understanding of the matter, it cannot be intended by the Court in such cases to put forward an officer of the Court to carry on business — which might involve the making of contracts almost daily in the ordinary course of business — in such a manner as would be likely to delude members of the public into the idea that somebody would be responsible on those contracts, whereas nobody would be so responsible. I do not say that there might not be very

* special cases in which the intention might be that re- [* 284]
 ceivers and managers should not pledge their personal credit, though I am not aware that any such have arisen; but with regard to receivers and managers appointed in the ordinary course of the business of the Court, unless I am much mistaken as to the meaning of such an appointment, the intention is

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that the receiver and manager so appointed should appear to the world as the person carrying on the business in the usual way, making himself personally liable on all contracts, except in cases where there might be a special stipulation to the contrary, and looking for indemnity to the assets or the persons for whose benefit ultimately the business was carried on. It would be impossible for a tradesman in the ordinary course of business to ascertain for whose benefit the business was carried on, or what funds might be available: and I do not think that the Court can be supposed to have intended by their action to place people in such a predicament. I do not say that it would be the duty of a receiver and manager to incur liabilities of an exceptionally heavy nature, but I think he must be understood to take on himself the ordinary liabilities that would fall on a person carrying on such a business as that to which his appointment relates. I do not say that, if the fund to which he was looking for indemnity failed, he might not come to the Court and ask to be relieved from responsibility; but I do not think he can get rid of responsibility on a contract merely by stating in the contract that he is a receiver. As soon as it appears that he has no principal, and is a receiver appointed by the Court, it is implied, I think, when he enters into a contract, that it is a real contract, by which he binds himself personally, and he must look for indemnity from the liability so incurred to the assets. With regard to the cases cited, I am not surprised to find that there is not much authority on the subject. I cannot remember any cases more pertinent to the matter than those which have been cited. The reason is, I think, that the matter has always been supposed to be one in which the law is well settled. I think that the notion upon which the Court has always proceeded, in exercising its jurisdiction to appoint a manager of a business, is, not that

he is to be in the position of an agent, although there is [* 285] no principal, but that he is to be in * a position similar

to that of persons who in a fiduciary capacity carry on a business, in the course of which contracts have to be entered into — *c. g.*, executors or trustees, who, by the terms of the instrument appointing them, are directed to carry on a business for the benefit of others. The rule has always been that such persons are *prima facie* themselves personally liable, and they cannot get rid of liability on the contracts made by them merely

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by describing themselves in the contract as executors or trustees. The Court could never have intended by its action to bring about such a state of things as that a business might be carried on perhaps for years, and then, owing to failure of the assets, all the creditors should go without payment. The cases cited to us appear to me to involve, even if they do not lay down, the principle which I have endeavoured to express. I am sure that neither JESSEL, M. R., in *Sargant v. Reed*, 1 Ch. D. 600, nor CHITTY, J., in *Taylor v. Neate*, 39 Ch. D. 538, supposed that they were dealing with a new question; they treat the matter as one familiar to the Court, and merely refer to that part of the duties of a manager appointed by the Court to which it was necessary to refer for the purposes of the particular cases before them. They both refer to the fact that such a manager must as a matter of course enter into contracts, and they neither of them appear to entertain any doubt that he would be liable upon them personally. For these reasons, I agree that the judgment should be affirmed.

Appeal dismissed.

ENGLISH NOTES.

Mortgages often contain provisions for the appointment of a receiver in order to ensure the regular payment of the interest out of the rents and profits without imposing on the mortgagee the responsibilities of a mortgagee in possession. Sometimes the appointment is made at the time of the mortgage either by the mortgage deed itself, or by a separate instrument; in other cases the mortgage deed contains a covenant by the mortgagor, if and when required by the mortgagee, to appoint as receiver such person as shall be nominated by the mortgagee.

The appointment is made by the mortgagor and not by the mortgagee, in order to constitute the receiver as agent of the mortgagor, who is thus rendered responsible for the acts and defaults of the receiver in exoneration of the mortgagee. See per ROLT, L. J., in *Law v. Glenn* (1867), L. R. 2 Ch. 634, at p. 641. See also *Jefferys v. Dickson* (1866), L. R. 1 Ch. 183, at p. 190, 35 L. J. Ch. 376, 14 L. T. 208, 14 W. R. 322.

A mortgagee may himself at any time appoint a receiver and if the appointment is justified by the nature of the property and the circumstances of the case, he will be allowed in account the remuneration and proper expenses of such receiver. (*Chambers v. Goldwin* (1804), 9 Ves. 254; *Davis v. Dendy* (1818), 3 Madd. 170, 18 R. R. 209.

The receiver so appointed is however the agent of the mortgagee and renders the latter liable to account as mortgagee in possession. *Leith*

v. Irvine (1833), 1 My. & K. 277. See *Gaskell v. Gosling* (C. A.), 1896, 1 Q. B. 669, 65 L. J. Q. B. 435, 74 L. T. 674.

Lord Cranworth's Act (23 & 24 Vict., c. 145), by section 11 empowers a mortgagee so soon as his power of sale under that Act arises "to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property." Sect. 17 empowers a mortgagee to appoint as receiver any person named for that purpose in the deed, or if no person is so named, to give notice in writing to the mortgagor to appoint a receiver, and on default to appoint within ten days after such notice, the mortgagee may himself by writing appoint a receiver. Sect. 18 provides that the receiver shall be deemed to be the agent of the mortgagor. Sect. 19 defines the powers of a receiver. Sect. 20 provides for the removal of a receiver and for the appointment of new receivers. Sect. 21 gives power to a receiver to retain out of moneys received by him a commission not exceeding 5 per cent upon the gross amount received. Sect. 22 provides that the receiver is to insure if so required by the mortgagee. And sect. 23 provides for the application of moneys received.

The above sections are repealed, but without prejudice to anything done or the effect of any instrument executed between the 28th of August, 1860, and the 31st of December, 1881 (44 & 45 Vict., c. 41, s. 71, and Sched.).

As regards mortgages made on or after the 1st of January, 1882, a mortgagee by section 19 (iii) of the Conveyancing and Law of Property Act 1881 (44 & 45 Vict., c. 41), is empowered "to appoint a receiver of a mortgaged property or any part thereof." Sect. 24 of the same Act provides that this power shall not be exercisable until the mortgagee has become entitled to exercise the power of sale conferred by the Act (as to which see p. 466 *ante*); that the appointment shall be in writing under the hand of the mortgagee; and that the receiver shall be deemed to be the agent of the mortgagor; and the section contains provisions as to the powers, duties, liabilities, remuneration and removal of receivers so appointed.

A receiver appointed by deed being the agent of the mortgagor is authorised to give notice to quit to tenants so as to render them liable in double value for holding over under the Statute 4 Geo. II., c. 28, s. 1. *Paole v. Warren* (1838), 8 Ad. & Ell. 582. If the mortgagor attorns to the receiver, the latter may distrain upon the mortgaged premises. *Jolly v. Arbuthnot* (1859), 4 DeG. & J. 224.

As a receiver appointed by a mortgagor or mortgagee derives his authority from the instrument appointing him, his powers, duties and liabilities should be clearly defined thereby.

It would seem that, even in the absence of express stipulations, a

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receiver will not be liable for involuntary losses. *Knight v. Lord Plymouth* (1747), 3 Atk. 480. See *Owen & Co. v. Cronk* (C. A. 1894), 1895, 1 Q. B. 265. 64 L. J. Q. B. 288. He will however be liable for losses arising from his misconduct. *Wren v. Kirtton* (1805), 11 Ves. 377, 8 R. R. 174.

Where an action is pending, the statutory power of appointing a receiver is not thereby determined, but the proper course is for the mortgagee to apply to the Court to appoint a receiver. *Tillett v. Nixon* (1885), 25 Ch. D. 238, 53 L. J. Ch. 199, 49 L. T. 598, 32 W. R. 226.

Formerly, if a legal mortgagee did not reserve by the mortgage deed, power to obtain the appointment of a receiver, he could not as a general rule obtain such appointment by order of the Court, but must have proceeded to eject the mortgagor. *Berney v. Sewell* (1820), 1 Jac. & Walk. 647, 21 R. R. 265.

By the Judicature Act 1873 (36 & 37 Viet., c. 66), s. 25 (8), a receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court "to be just or convenient" that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

The Court has no jurisdiction to appoint a receiver unless an action is pending. *Ex parte Mountfort* (1809), 15 Ves. 445. But for this purpose proceedings commenced by an originating summons is an action. *Re Fawcitt, Galland v. Burton* (C. A. 1885), 30 Ch. D. 231, 54 L. J. Ch. 1131, 55 L. J. Ch. 568, 53 L. T. 271, 34 W. R. 26.

The appointment of a receiver is a matter entirely within the discretion of the Court, having regard to the circumstances of the particular case. *Greville v. Fleming* (1845), 2 Jo. & Lat. 335 at p. 339; *Re Pound, Son & Hutchins* (C. A. 1889), 42 Ch. D. 402 at p. 419, 58 L. J. Ch. 792, 38 W. R. 18.

The appointment of a receiver will as a general rule be made on the application of a mortgagee if the interest is in arrear. *Shackell v. Duke of Marlborough* (1819), 4 Madd. 463. So also if the property is in jeopardy. *Evans v. Coventry* (1854), 5 DeG. M. & G. 911.

Formerly a mortgagee who had taken possession could not have a receiver appointed by the Court. *Sturch v. Young* (1842), 5 Beav. 557. But now if the circumstances render it "just and convenient" a receiver may be appointed in such a case. *Tillett v. Nixon, supra*.

If a prior mortgagee be in possession, the Court will not in general appoint a receiver on the application of a subsequent mortgagee; but if the prior mortgagee is not in possession a subsequent mortgagee may obtain the appointment of a receiver without prejudice to the rights of the prior mortgagee. *Berney v. Sewell, supra*.

 No. 51. — *Dickenson v. Harrison*, 4 Price, 282. — Rule.

AMERICAN NOTES.

The New York rule that a receiver will be appointed when the mortgagor is insolvent and the security is inadequate (*Bank of Ogdensburg v. Arnold*, 5 Paige, 39), is not approved in New Jersey (*Cortelyea v. Hathaway*, 3 Stockton Chan. 39; 64 Am. Dec. 478); nor in California (*Guy v. Ide*, 6 California, 99; 65 Am. Dec. 490); nor in Michigan (*Wagar v. Stone*, 36 Mich. 364), because the mortgagor may take possession at any time.

Where a mortgage contains no provision subjecting the rents and profits to secure the mortgage, and there is no allegation of waste, no receiver of rents and profits will be appointed. *Hardin v. Hardin*, 34 South Carolina, 77; 27 Am. St. Rep. 786, and notes, 793, 796.

But the New York rule generally prevails. *Main v. Ginthert*, 92 Indiana, 180; *Jacobs v. Gibson*, 9 Nebraska, 380; *Price v. Dowdy*, 34 Arkansas, 285; *Myton v. Davenport*, 51 Iowa, 583; *Douglass v. Cline*, 12 Bush (Ky.), 608; *Chase's Case*, 1 Bland (Maryland Chan.), 206; *Brown v. Chase*, 32 Mich. 225; *Phillips v. Eiland*, 52 Mississippi, 721; *Kirchner v. Farley*, 80 North Carolina, 24; *Henshaw v. Wells*, 9 Humphreys (Tenn.), 568; *Schreiber v. Corey*, 48 Wisconsin, 208; *Haas v. Chicago B. Soc.*, 89 Illinois, 498.

A mortgagee is not responsible for the receiver's default. *Sorchan v. Mago*, 50 New Jersey, Eq. 288, citing *Hutchinson v. Massarene*, 2 Ball & B. 55.

No. 51. — *DICKENSON v. HARRISON*.

(EX. 1817.)

RULE.

WHERE a mortgage deed contains a covenant for payment of principal and interest on a fixed day, the principal and the interest are two distinct debts, and either may be sued for separately from the other.

Dickenson v. Harrison.

4 Price, 282-288 (18 R. R. 711).

Mortgage. — Principal and Interest. — Separate Claim.

[282] A principal sum secured by deed, and the interest stipulated to be payable thereon, are two distinct sums, and not one entire sum, and either may be sued for, independently of the other.

Interest is not a part of the debt secured by mortgage, but rather sounds in damages, although, *semble*, it may be sued for in debt.

The plaintiff declared in debt against the defendant, on a mortgage for securing the sum of £800, to be paid on a future day, with interest.

No. 51. — *Dickenson v. Harrison*, 4 Price, 282-284.

To that declaration the defendant demurred; for that an action for debt is not by law maintainable for part of an entire duty created by one and the same covenant or contract; nor can part of such duty be declared for in such action as debt, and part damages, where the covenant is express to pay the principal sum with interest; and also, for that an action of debt is not by law maintainable for interest accruing from day to day; and that the said declaration does not show any right in the said plaintiff to recover the said sum of £800 thereby demanded.

Lawes, E. for the demurrer, contended that the declaration was bad, for want of an averment that the interest up to the day of default had been paid; for that a declaration in debt for part of a duty, without showing that the residue had been satisfied, could not be supported; and he cited *Mounson v. Redshaw*, 1 Saund. 201. This demand, he submitted, was for * a sum [* 283] of money due upon mortgage, and therefore the interest up to the day was recoverable in debt, as part of the contract, and therefore ought to have been included, or stated to have been satisfied. On that ground he distinguished this case from that of *Seaman v. Dee*, 1 Ventr. 198, for the debt, in that case, became due on the making of the deed, and there the interest, held not to be recoverable in debt, must have been as to such as should have become due after the day; and in *Herries v. Jamieson*, 5 T. R. 553, where the authority of that case was generally doubted by Lord KENYON, and therefore much shaken, it was held, that debt would lie for the interest of money. In *Lapiere v. Gen. St. Albans*, 2 Ld. Raym. 773, it was held, that on a single bill for a sum certain, the interest ought to be taxed; but where the interest is not in damages, but is stated and fixed at a certain rate, debt will lie. *Williams v. Fowler*, 1 Str. 410.

The main ground of this demurrer (he submitted) was, that in the present case the interest up to the day of bringing the action was recoverable as part of the debt, which is entire, and cannot be kept separate; and the declaration, therefore, was radically bad, unless the interest were shown to have been paid. So Com. Digest, tit. Pleader, 84 (C. 84) and *Holt v. Sambach*, Cro. Car. 104. To the same point he cited *Welbie v. Phillips*, 2 Ventr. 129, where it was held on demurrer that a declaration for less than * the [* 284] plaintiff was entitled to, under one entire and several demand, was bad. So also in *Hunt v. Braines*, 4 Mod. 402;

Pemberton v. Shelton, Cro. Jac. 498; and *Bailey v. Offord*, Cro. Car. 137.

Littledale, in support of the declaration, insisted that the plaintiff was entitled to abandon any claim of interest which he might have, and proceed for the principal alone. Then the question on the record would be, whether the plaintiff were entitled to recover the principal. He submitted that this was precisely the case put by Lord HALE, in *Seaman v. Dec*, of a party covenanting by deed to pay principal and interest, where it was held that the interest was not to be included with the principal in an action for debt. The reason being, that it shall be turned into damages, which the jury is to measure. Whatever doubt was thrown on that case by the *dictum* of Lord KENYON, in *Herries v. Jamieson*, it was not overruled; nor was it necessary on that decision that it should be; for the sole result of that case is, that if a plaintiff choose to proceed for interest separately, he may do so. In the case cited from Cro. Car. and in all the others, the plaintiff declared for less than was manifestly due to him on his own showing, and in those of course the declaration would be bad, unless it was shown that the rest had been satisfied. There are cases which

hold that a plaintiff must wait till the last day, but here [*285] the last day was past. A party may either sue for *a principal sum of money, or for the interest due on a given day; but if he sue for the latter, he must declare for the whole, or show the rest satisfied. In the case of *Welbie v. Phillips*, the plaintiff sued for a whole year's rent, and declared for only half a year. The distinction is, that in this case the contract for repayment of the principal sum is independent of the contract for the payment of interest. In cases of rent, if one proceed for a subsequent quarter, it shall be intended that the previous quarters have been satisfied; but the demand of interest is quite different, because it is accruing from day to day.

Lawes, in reply:—

There can be no intendment on a special demurrer. Though interest be a claim accruing from day to day, it may still be sued for integrally up to any given time, for *id certum est quod certum reddi potest*. The authority of Lord HALE, in *Seaman v. Dec*, it has not been necessary to impugn, because that case is distinguishable. The jury cannot assess interest up to the day in a case of this sort, by way of damages *detentione debiti*. The argument, that the

plaintiff may abandon his claim of interest, is answered by the fact of his not having so declared, and that it is which forms the objection to the declaration raised by this demurrer; for if that claim had been explicitly abandoned, there would have been no ground for this discussion.

GRAHAM, Baron:—

It would have been more satisfactory to me to have taken time on so nice and important a question as the present; but as my *brothers entertain no doubt, I shall give my opinion [* 286] at once. [His lordship then stated the objection raised by the demurrer.] Now certainly common sense suggests, that there would be much hardship in allowing that objection to prevail, by holding that a party cannot waive his claim for interest, and sue his debtor for the principal sum due only; and I feel myself grounded in deciding that he may, by the authority of my Lord HALE in the case of *Seaman v. Dec*; and I do not consider that his opinion has been overturned by the subsequent case of *Herries v. Jamieson*. I think the distinction taken by Lord HALE is sound and just. Indeed the case of *Herries v. Jamieson* differs from it only in holding, that, notwithstanding interest in general is properly for the consideration of a jury, because sounding in damages, yet that a party may bring debt for it wherever the amount has been liquidated.

When the sum sued for is less than what appears to be due, no doubt it should be shown that the rest has been paid; but in a case where the claim of interest is created by deed, the principal debt is one thing, and the interest accruing, another. The latter is in the nature of damages only, and therefore the plaintiff may, if he pleases, waive that claim.

WOOD, Baron:—

Notwithstanding a great many cases have been cited in support of this demurrer, I think them all distinguishable from the present, and that the objection which has been raised by it is not on any ground sustainable.

In the deed, as set out in the declaration, there is the [287] usual covenant that the defendant would pay the plaintiff the sum of £800 and also something more at the same time, which was the interest, and that is equivalent to a covenant to pay two distinct and independent sums of money. The breach is, that nevertheless the said defendant did not, nor would, pay the said

sum of £800, on the day and time mentioned and appointed for payment of the same. In all probability the interest has been paid down to the time: afterwards there must have accrued some further interest, but that can be recoverable only in the way of damages.

The question on this demurrer amounts in truth to this—whether, when two distinct sums are due to the same person, on the same day, under the same instrument, he may not sue for either, at his election; or whether he is therefore necessarily compelled to proceed for both in the same action.

I am of opinion that he might sue for either; and in the present case, I think the sums are completely distinct and unconnected, notwithstanding they become due by the same instrument, and that they may therefore be separated by a plaintiff who sues to recover them, so as to be made the subject of separate actions.

The decisions that have been cited were all on cases where the debt was one entire demand; and I agree that where that is so you must aver in your declaration, if you proceed for a part of the

debt, that the rest has been satisfied; as if in this declaration [*288] in debt for £800 after having set out the covenant,

the plaintiff should have gone on to state whereby an action hath accrued to him, to demand and have of and from the said defendant £700; that would have been an obvious and palpable inconsistency on the face of the declaration, which would undoubtedly have been, therefore, bad; but that is not so here, or anything like it; he demands strictly the integral sum of £800; and that is a good demand; for the other sum is distinct and separable, and need not be demanded by the declaration, or shown to have been satisfied.

I am therefore of opinion, that this declaration is properly drawn. It certainly might have been made more formal, but that was by no means necessary; therefore there must be judgment for the plaintiff.

GARROW, Baron, concurred:—

I will say one word only, varying my opinion from that of my Brother WOOD, who has said that these two sums are separable— I say that they are in their nature separate, and never were one integral sum, and the reason, good sense, and justice of the case are all against the objection.

Per CURIAM:

Judgment for the plaintiff.

ENGLISH NOTES.

The rule is well settled that the rights of the mortgagee to sue for principal and interest on the personal covenant of the mortgagor for payment of the same respectively are distinct rights, and are separately enforceable. See *Attwood v. Taylor* (1840), 1 Man. & Gr. 279, at p. 307. If no days are appointed for payment of interest, as interest accrues from day to day, it seems that the mortgagee may sue for interest at any time. See *Wilson v. Harman* (1755), 2 Ves. Sen. 672. See also *Re Roger's trust* (1861), 1 Dr. & S. 338.

The right to sue on the covenant for the principal arises only on default in payment. Where a day is fixed by the mortgage deed for payment an action will lie on default in payment on that day, which is usually six months after the date of the mortgage. *Erons v. Jones* (1839), 5 M. & W. 295. If the mortgage deed provides that the principal shall not be called in till a distant date, or till the happening of a specified event, the right to sue will be suspended in the meantime, provided the mortgagor strictly performs the conditions, if any, as to punctual payment of interest or otherwise, on which the suspension of the right to call in the moneys depends. *Brougham v. Squire* (1852), 1 Drew. 151. See *Leeds and Hanley Theatre of Varieties v. Broudbent*, 1898, 1 Ch. 343.

If the principal is made payable "on demand" simply, the mortgagee may sue for it at any time after the mortgagor has executed the instrument. See *Morton v. Ellam* (1837), 2 M. & W. 461. If, however, the covenant is by a surety by way of collateral security, formal demand must be made on him before action brought. *Re Brown's Estate, Brown v. Brown*, 1893, 2 Ch. 300, 62 L. J. Ch. 695, 69 L. T. 12, 41 W. R. 440.

If the covenant is not simply to pay "on demand," but to pay "on notice" or "on demand in writing," the notice or demand must be such as to give the mortgagor reasonable time to obtain the money. *Ex parte Trevor, Re Burghardt* (1875), 1 Ch. D. 297, 45 L. J. Bk. 27, 33 L. T. 756, 24 W. R. 301. See *Moore v. Shelley* (1883), 8 App. Cas. 285, 52 L. J. P. C. 35, 48 L. T. 918.

A mortgagee who sues on the covenant without claiming foreclosure may specially endorse his writ under R. S. C. Ord. III. s. 6, and obtain summary judgment under R. S. C. Ord. XIV. s. 1. *Satchwell v. Clarke* (C. A. 1892), 66 L. T. 641. And he may obtain summary judgment if the defendant does not appear under R. S. C. Ord. XIII. s. 3, even though the writ also is endorsed for a claim for an account and foreclosure: but in such case he will not be entitled to a foreclosure judgment under R. S. C. Ord. XV. *Bissett v. Jones* (1886), 32 Ch. D.

No. 51. — *Dickenson v. Harrison.* — Notes.

635, 55 L. J. Ch. 648, 54 L. T. 608, 34 W. R. 591. See *Imbert-Terry v. Carver* (1887), 34 Ch. D. 506, 56 L. J. Ch. 716, 56 L. T. 91, 35 W. R. 328.

The personal liability under the covenant attaches to the mortgagor and after his death to his personal representatives to the full extent of the assets in their hands, which now in the case of a mortgagor dying on or after the 1st of January, 1898, includes by virtue of the Land Transfer Act 1897 (60 & 61 Vict., c. 65), s. 1, his real estate.

The personal liability of the mortgagor and his personal representatives continues, although he may have conveyed the equity of redemption by way of sale to a third party. But in such a case the mortgagee will only be entitled to judgment on the terms that he shall reconvey the mortgaged property to the original mortgagor or those claiming under him. *Kinnaird v. Trollope* (1888), 39 Ch. D. 636, 57 L. J. Ch. 905, 59 L. T. 433, 37 W. R. 234; See *Schoole v. Sall* (1803), 1 Sch. & Lef. 176.

On the other hand the liability on the covenant does not attach to a purchaser of the equity of redemption. *Butler v. Butler* (1800), 5 Ves. 534.

The purchaser of an equity of redemption must, however, indemnify the vendor against any liability to be sued on the covenant for payment of the mortgage debt. *Bridgman v. Dove* (1891), 40 W. R. 453.

AMERICAN NOTES.

The doctrine of the principal case that interest is only allowed as damages hardly prevails here. Mr. Jones says: "Interest is the thing the mortgage is made for when it secures a loan of money." "Interest follows" (after default) "as an invariable legal incident of the debt." (1 Mortgages, sects. 73, 74.) Undoubtedly the mortgagee may sue for the interest alone, but it is probable that he will not be allowed to sue for the principal and the interest separately, and thus burden the mortgagor and the land with double costs. The mortgagor could probably compel consolidation of the suits, under the Code practice.

In *Jones v. Gresham*, 6 Blackford (Indiana), 291, it was held that "the demand of principal and interest, upon a covenant to pay a specific sum with interest, is divisible," citing *Verney v. Iddings*, 2 Chit. 234; and therefore that the plaintiff might sue for the principal alone.

No. 52. — *BALFE v. LORD.*

(1842.)

RULE.

As a general rule upon default in payment of the moneys secured by a mortgage, the mortgagee, whether legal or equitable, and whether he has taken possession or not, may bring his action to foreclose the mortgagor of his equity of redemption.

Balfe v. Lord.

2 Drury & Warren, 480—489.

Mortgage. — Right to Foreclose.

By deed, reciting that A. had agreed to advance to B. a sum of money [480] upon a mortgage of certain premises, B., in consideration of said sum, conveyed the same to A., to hold for the lives then in existence, and for the lives of such other persons, as should forever thereafter be added thereto; and the deed contained a covenant on the part of B. for repayment of the said sum, when-ever required, and also the accruing interest half yearly, so long as the principal money should remain unpaid; and collaterally with this deed, a bond with warrant of attorney was executed by B. to A., upon which judgment was entered:

Held, that the plaintiff was entitled to sustain a bill for a foreclosure and sale.

A Court of equity will presume an instrument of this nature, intended as a security for money advanced, to be an ordinary mortgage, accompanied with the usual remedies, unless the terms of the instrument exclude such a construction.

An objection by a prior mortgagee, that the plaintiff, a puisne mortgagee, has not offered by his bill to redeem him, if taken for the first time at the hearing, cannot be maintained.

By indenture bearing date the 4th of July, 1827, and made between the Rev. Arthur Lord and the Rev. Arthur Wolfe Lord of the one part, and George Owens of the other part; after reciting the title of Arthur Lord to certain premises, which were held under leases for lives, with covenants for perpetual renewal, and were called the lands of Bruslandstown and Rousky, in the county of Meath, and that the said George Owens had lent unto the said Arthur Lord and Arthur Wolfe Lord the sum of £800, and that it was agreed, that the same should continue on loan to

the said parties from henceforth, until by possession and receipt of the rents, issues, and profits of the said lands and premises, the said sum and interest, and the half-yearly balances and interest thereof, should be fully paid off and satisfied, determinable, nevertheless, in the event thereafter mentioned; and reciting further, that for securing the punctual payment of the said sum of £800, the said Arthur Lord and Arthur Wolfe Lord had agreed to put the said George Owens into immediate possession and receipts of said rents, issues, and profits; it was witnessed that in performance of the said agreement, the said Arthur Lord and Arthur Wolfe Lord did convey the said premises unto the said George Owens, to hold the same from the date thereof, until by possession and receipt of the rents, issues, and profits of the said lands and premises, the said sum of £800 and all [* 481] arrears and interest thereof * should be fully paid off and discharged; subject, however, to the payment of the head rents, and the performance of the covenants in the respective leases, under which said lands were held: and upon this further trust, that the said George Owens should receive and retain the rents, issues, and profits of said lands, until by perception and receipt of same, or by payment, the said sum of £800 and all arrears and interest thereof should be lawfully paid off and satisfied by the said Arthur Lord or Arthur Wolfe Lord, or either of them; and from and immediately after the full payment of said sum, and the interest thereof, upon trust, to assign and convey the said lands unto and for the proper use and benefit of the said Arthur Lord and Arthur Wolfe Lord, or the survivor of them, his heirs, executors, administrators, or assigns, or in such manner as they should direct.

There was a covenant on the part of George Owens, that he would furnish yearly accounts and strike a regular annual balance, and that when said debt was fully satisfied, he would execute all such deed or deeds as would be necessary for conveying said lands and premises to the said Arthur Lord and Arthur Wolfe Lord; and Arthur Lord and Arthur Wolfe Lord then covenanted that they had a right to convey, and "that if default should be made in payment of the said sum of £800, or the interest thereof, at the time thereinbefore agreed¹ upon for payment of the same;" they the said Arthur Lord and Arthur Wolfe Lord

¹ So in brief.

would execute all such further assurances, as would be necessary for assuring same.

Arthur Lord died shortly afterwards, leaving the said
* Arthur Wolfe Lord his eldest son and heir-at-law, and [* 482] having by his will appointed the Rev. Matthew Eaton his executor.

By deed of the 27th of November, 1828, and made between the said Rev. Arthur Wolfe Lord of the one part, and Mr. John Cower of the other part, after reciting the title of Lord, as before stated, and that Cower had advanced to Lord the sum of £244, and that it was agreed that the same should continue a loan until the 1st of November, 1831, without bearing any interest, and that from thenceforth the said sum should bear interest at the rate of six per cent until same was fully paid off and satisfied; the said A. W. Lord, in consideration thereof, released and conveyed the said lands into the said John Cower, his heirs, executors, administrators, and assigns, to hold the same until the said principal sum and all interest and costs attendant thereon should be fully paid off and satisfied; subject, however, to a proviso or condition of redemption for making void the said demise, upon payment of the said sum of £244, with interest for the same, on the 1st of November, 1831. And the said A. W. Lord thereby covenanted that he would well and truly pay the said sum of £244, with all interest, on the days and times therein appointed for payment thereof.

John Cower died in the year 1840, having by his will appointed William Henry Wright (one of the defendants) the trustee and executor of his will.

On the 18th of September, 1832, by a certain other deed, made between the said Rev. Arthur Wolfe Lord of the one part, and the said George Owens of the other part, reciting that Lord, having occasion for the loan of £300, had requested
* the said George Owens “to advance same to him upon a [* 483] mortgage” of the said lands and premises, and had agreed to pay interest at the rate of six per cent; the said deed witnessed, that in consideration of said sum, the said A. W. Lord conveyed the said lands unto the said George Owens, to hold the same from thenceforth, for and during the lives, &c., in the said renewal named, and for and during the lives of such other persons as should be for ever thereafter added and inserted to the term

of said freehold, subject to the payment of the head rent and the performance of the covenants contained in the lease, under which same were held. There was a covenant on the part of Arthur Wolfe Lord that he would pay to the said George Owens the said sum of £303, "when required so to do by the said George Owens, his heirs, and assigns as also the accruing interest thereon, at the rate of six per cent per annum; the same to be paid half-yearly from the day of the date of these presents, so long as the said principal money or sum of £300 shall remain due and unpaid." There was then a covenant on the part of Lord for further assurance; and on the part of George Owens, "that upon full payment of the entire amount of the principal money and all interest due thereon, together with any costs attendant thereon, to the said George Owens, his heirs and assigns, these presents, as well as a certain bond of the said Arthur Wolfe Lord, with warrant of attorney annexed bearing equal date, and executed collaterally herewith, shall absolutely cease and become null and void;" and that the said George Owens, his heirs and assigns, should thereupon execute a re-assignment of, and re-deliver to him, those presents, together with the said collateral bond cancelled.

George Owens died in the year 1837, having appointed [* 484] * Thomas Balfe, one of the plaintiffs, his executor; John Richard Owens (the other co-plaintiff) was his eldest son and heir-at-law.

The bill was filed by the said Thomas Balfe and John Richard Owens against Arthur Wolfe Lord, Matthew Eaton, and W. H. Wright, and after setting forth the said deeds of the 4th July, 1827, and the 18th of September, 1832, and that George Owens had only entered into possession of a small part of the lands comprised in the deed of 1827, sufficient to keep down the interest on the principal sum secured thereby, and charging that the entire of said two principal sums of £800 and £300 were still due; it prayed for an account of what was due, and payment, and in default thereof, for a sale of the mortgaged lands; or a competent part thereof, for an account of all prior charges, and for a receiver.

Wright was made a party defendant in relation to the mortgage of the 27th of November, 1828, which was vested in him under the will of Cower. The plaintiffs did not offer by their bill to redeem this mortgage.

The defendant, Arthur Wolfe Lord, by his answer, submitted to

the Court, whether, under the deeds of the 4th of July, 1827, and the 18th of September, 1832, it was competent for the plaintiffs to call for a sale of the said premises; or whether, on the contrary, the right of the said George Owens, his heirs, executors, and administrators, was not confined to the perception of the rents, issues, and profits, until the sums so secured were paid off and satisfied, subject, however, at all times, to the right of redemption of the defendant, his heirs, executors, administrators, and * assigns, on payment of any balance that might re- [* 485] main unsatisfied on foot of said securities.

Mr. M'Donnell, Mr. O'Shaughnessy, and Mr. H. G. Hughes, for the plaintiffs,¹ contended, that the covenant in the second mortgage for repayment by the defendant, Lord, whenever required, distinguished this case from that of a Welsh mortgage, and that they were entitled to the ordinary decree.

Mr. Gayer and Mr. Ferguson, for the defendants.

The mortgage of the 18th of September, 1832, is a Welsh mortgage, in which case there can be no foreclosure. *Bonham v. Newcombe*, 1 Vern. 232; *Howel v. Price*, 1 P. Wms. 291. In the case of *O'Connell v. Cummins*, 2 Ir. Eq. Rep. 251, a question of this kind arose at the Rolls, upon a demurrer to a bill filed to foreclose a security such as this, and his Honor allowed the demurrer. As to the covenant on the part of the mortgagor for repayment whenever required, which is put forward by the plaintiffs as distinguishing this case from that of the common Welsh mortgage, the same circumstance was relied on in the case of *Teulon v. Curtis*, Younge, 610, where a mortgagee, claiming under a precisely similar security, filed a bill for foreclosure; Lord LYNTHURST, however, held clearly, that notwithstanding the covenant for repayment, the security was in the nature of a Welsh mortgage, and dismissed the bill.

Mr. Baker for the defendant Wright, the mortgagee under the mortgage of the 27th of November, 1828, insisted * that the bill ought to be dismissed as against him, the [* 486] plaintiffs not having offered to redeem *M'Donough v. Shewbridge*, 2 Ball & B. 555; *Drew v. O'Hara*, 2 Ball & B. 562.

The LORD CHANCELLOR(SUGDEN): —

I will read over the case of *Teulon v. Curtis* before I decide the present case. In the deed of mortgage of the 18th of September,

¹ The case was only argued upon the mortgage of the 18th of September, 1832.

1832, there is a covenant on the part of the mortgagor, that he will pay unto the said George Owens, his heirs, or assigns, the sum of £300, when required so to do by the said George Owens, as also the accruing interest thereon, &c. This is an absolute undertaking on the part of the mortgagor to pay, whenever he shall be required, and on such payment he will be entitled to a reconveyance of the estate. Now, this is very different from the case of a Welsh mortgage. In such a case the mortgagee is to keep possession, until by perception of the rents and profits he is fully paid; but he can not at any moment he pleases call for payment of the principal and interest. The essence of a Welsh mortgage is, that there is no forfeiture, the principal not being payable at any given time; but here there is a covenant to pay the principal and interest, whenever the party chooses to call for it; and the mortgagor may call for a reconveyance of the estate at any moment, after he has paid the sum due. It appears to me that the mortgage in this case is not a Welsh mortgage, but a common mortgage with a proviso unskillfully prepared.

With regard to the intervening mortgage to Cower, now [*487] vested in Wright, I shall not dismiss the bill although *the plaintiffs have not offered by their bill to redeem, as they ought to have done. The point is not made by the answer, and I am unwilling to give any weight to mere formal objections of this kind, made for the first time at the hearing. I shall give the defendant the exact relief to which he would be entitled, if the prayer were right. The plaintiffs must undertake to redeem the mortgage according to the usual course of the Court.

The LORD CHANCELLOR:—

I have read over the case of *Toulon v. Curtis*, and looked into the mortgage deed. The deed is singularly framed, and most inaccurately. An estate, in consideration of a loan of £300, is conveyed absolutely to a Mr. Owens. The borrower then covenants, that he will, on demand, repay the said sum of £300, with interest at the rate of six per cent, the same to be paid half-yearly so long as the principal sum shall remain unpaid: and that he will do all such other acts as may be necessary for the further securing the repayment of the principal sum: and the lender covenants on his part that on payment of the principal sum and interest, he will re-assign. Now it is said, that this is a Welsh mortgage, and that in such a case there can be no foreclosure or sale. A Welsh mort-

gage is a conditional sale; under it the lender goes into possession of the rents, and continues to receive them, until the party who borrowed the money chooses to redeem, and this he is always permitted to do; so that the peculiarity is, that while there can be no foreclosure on the part of the mortgagee, still a right of redemption subsists in the mortgagor. But in the present case what is essentially incident * to a Welsh mortgage is [*488] wanting, for there is no provision that the lender shall have the rents of the estate. If, under the covenant to pay the sum borrowed when demanded, the money be not paid on demand, a forfeiture would ensue. The party, failing to pay according to his covenant, would not be entitled to a reconveyance; but still he would have an equity of redemption, and the plaintiffs are consequently entitled to sustain their bill for a foreclosure and sale.

As to the case of *Teulon v. Curtis*, the facts are these: Allen, who was the owner of a reversionary estate of inheritance, being indebted to the plaintiff in £1000, demised this property to the plaintiff for a term of 500 years, with a proviso for cesser of the term on payment to the plaintiff of the principal and interest. There was in the deed a covenant on the part of Allen for payment on demand of this principal sum; and further, that until payment the plaintiff might enter, and hold, and enjoy the premises. It was held that this mortgage, notwithstanding the covenant for payment, was in the nature of a Welsh mortgage, and that a bill of foreclosure could not be sustained. The CHIEF BARON seemed to think, that the two covenants were not inconsistent; that is, that it was not inconsistent that the one party should stipulate to hold the property, until his debt was paid, and that the debtor should covenant to pay the debt on demand. I cannot say that these covenants are altogether inconsistent. The debtor might say, "I will give a personal obligation, and I will also pledge the rents and profits of a particular estate." But there is a circumstance in that case, which altogether distinguishes it from the present, viz., a stipulation, that until payment the party entitled to the money might enter into the receipt of the rents and profits; that gave it the character * of a Welsh mortgage, and that is wholly [*489] wanting here. That case might have been open to another consideration; that although the party was to enter into the receipt of the rents and profits, and to continue therein until the

money was paid; yet that, as the security was a reversion expectant on a life estate, the entry, which was contemplated, could not have been an immediate one, but must have been intended to take place on non-payment of the principal on demand, subsequently to the dropping of the life; there was a covenant to pay on demand, and it might have been argued, that if there was a demand, and payment was not made, the party was then to enter into the receipt of the rents and profits; it would then have been the case of a common mortgage, and in this view the covenants would be equally consistent. I should always presume that an instrument of this nature, intended as a security for money advanced, was an ordinary mortgage, accompanied with the usual remedies, unless the terms of the instrument excluded that construction.

In the present case it would be inconsistent with the covenant to say, that the party is not to pay when payment is demanded. Again, the debt is secured by bond and judgment: would it not be a strange conclusion to come to, that the creditor might take the debtor's person, and proceed against any other property, of which he was possessed, but not against the very property which was pledged as his particular security? Why should he not have all the remedies against this property which he might have against the other? It seems to me somewhat singular to argue, that he is not to be permitted to go against the only and very security, which was intended to be given to him. I think, upon the whole of the case, there must be a decree for the plaintiffs, and in the common form.

ENGLISH NOTES.

It has been seen (p. 1 *et seq.*, *ante*) that the test whether the transaction is a mortgage is whether the remedies are mutual and reciprocal. Also (p. 358 *et seq.*, *ante*), that the right of redemption is inherent to every mortgage. The correlative and reciprocal remedy to redemption is foreclosure. Equity, which by its interference has restrained the mortgagee from the assertion of his legal rights to absolute ownership under the strict terms of the contract, upon default of the mortgagor to discharge the debt after reasonable time given to him, simply removes the stop it has itself put on, or in other words decrees foreclosure. *Carter v. Wake* (1877), 4 Ch. D. 605, 46 L. J. Ch. 841.

A mortgagee may bring his action for foreclosure without taking possession. *Lord Penrhyn v. Hughes* (1799), 5 Ves. 99 at p. 106.

The right of the mortgagee to foreclosure is not ousted by his having

No. 52. — *Balfe v. Lord.* — Notes.

a power of sale either express or statutory. *Slade v. Rigg* (1843), 3 Hare, 54, 44 & 45 Viet., c. 41, s. 21 (5).

A mortgagee of copyholds may bring his action for foreclosure before admittance. *Sutton v. Stone* (1740), 2 Atk. 100.

An equitable mortgagee under an agreement for a legal mortgage may foreclose. *Frail v. Ellis* (1852), 16 Beav. 350. So also a mortgagee by deposit of title deeds. *James v. James* (1873), L. R. 16 Eq. 153, 42 L. J. Ch. 386, 21 W. R. 522; *York Union Banking Co. v. Artley* (1879), 11 Ch. D. 205, 27 W. R. 704.

In the case of a Welsh mortgage the mortgagee cannot enforce foreclosure. *Longuet v. Scarwen* (1750), 1 Ves. Sen. 402, 406.

A conveyance in trust that the estate shall stand charged with a sum of money and interest with power of sale, is not a mortgage entitling the grantee to foreclose. *Sampson v. Pattison* (1842), 1 Hare, 533; See *Taylor v. Emerson* (1843), 2 Dr. & War. 117.

Trustee-mortgagees may generally foreclose like ordinary mortgagees, but a trustee lending his own money on the security of the trust estate will not be allowed to foreclose. *Tennant v. Trenchard* (1869), L. R. 4 Ch. 537, 38 L. J. Ch. 169.

The transferee of a mortgagee may foreclose. *Withington v. Tate* (1869), L. R. 4 Ch. 288, 20 L. T. 637, 17 W. R. 559.

A sub-mortgagee may foreclose the original mortgagor. *Hobart v. Abbott* (1731), 2 P. Wms. 643; *Coles v. Forrest* (1847), 10 Beav. 552.

The trustee of a bankrupt mortgagee may foreclose without leave of the judge in bankruptcy. *Waddell v. Toleman* (1878), 9 Ch. D. 212, 38 L. T. 910, 26 W. R. 802.

A mortgagee is entitled to foreclosure notwithstanding the bankruptcy of the mortgagor. *White v. Simonds* (1871), L. R. 6 Ch. 555, 40 L. J. Ch. 689, 19 W. R. 939; *Ex parte Pannell, In re England* (C. A. 1877), 6 Ch. D. 335, 37 L. T. 450, 26 W. R. 194.

Mortgagees of the following kinds of property have been held to be entitled to foreclosure: Mortgagee of advowson: *Gardiner v. Griffith* (1726), 2 P. Wms. 404. Mortgagee of reversionary interest in public stock: *Slade v. Rigg, supra.* Mortgagee of a pension: *James v. Ellis* (1870), 19 W. R. 319. Mortgagee of railway shares: *General Credit & Discount Co. v. Glegg* (1883), 22 Ch. D. 549, 52 L. J. Ch. 297, 48 L. T. 182, 31 W. R. 421. Mortgagee of a share in a partnership: *Redmayne v. Foster* (1866), L. R. 2 Eq. 467. See, however, as to the mortgagee's rights after foreclosure has rendered him absolute owner of the share, sect. 31 of the Partnership Act, 1890 (53 & 54 Viet., c. 39). Mortgagee of unpaid calls on shares in a joint stock company. *Sadler v. Worley*, 1894, 2 Ch. 170, 63 L. J. Ch. 551, 70 L. T. 494, 42 W. R. 476. Mortgagee of land in a British Colony or dependency: *Payet v.*

Ede (1874), L. R. 18 Eq. 118, 43 L. J. Ch. 571, 30 L. T. 228, 22 W. R. 625.

The remedy by foreclosure does not apply to the undertaking of a railway, canal, or other company established by the Legislature for carrying out a public object. *Gardner v. London, Chatham, & Dover Railway Co.* (1866), L. R. 2 Ch. 201, 36 L. J. Ch. 323, 15 L. T. 552, 15 W. R. 324; *Blaker v. Herts and Esser Waterworks Co.* (1889), 41 Ch. D. 399, 58 L. J. Ch. 497, 60 L. T. 776, 37 W. R. 601.

The same observation applies to tramway companies formed under the Statute 33 & 34 Vict., c. 78; *Marshall v. South Staffordshire Tramways Co.* (C. A.), 1895, 2 Ch. 36 at p. 54, 64 L. J. Ch. 481, 72 L. T. 542, 43 W. R. 469.

AMERICAN NOTES.

"Persons having interests in the property paramount to the mortgage sought to be foreclosed are generally neither necessary nor proper parties to the suit, because the only proper object of the proceedings is to bar all rights subsequent to the mortgage. The decree can have no effect upon the rights of parties having priority, whether they are made parties to the action or not." 2 Jones on Mortgages, sect. 1439; *Jerome v. McCarter*, 94 United States, 734; *Lewis v. Smith*, 9 New York, 502; 61 Am. Dec. 706; *Weed v. Beebe*, 21 Vermont, 495; *Strobe v. Downer*, 13 Wisconsin, 10; 80 Am. Dec. 709; *Hoppock v. Ramsey*, 28 New Jersey Eq. 413; *Tome v. Loan Co.*, 34 Maryland, 12; *Hague v. Jackson*, 71 Texas, 761; *Weil v. Uzzell*, 92 North Carolina, 515; *Flournoy v. Harper*, 81 Alabama, 494; *Dickerson v. Uhl*, 71 Michigan, 398; *Krutsinger v. Brown*, 72 Indiana, 466; *Stratton v. Reisdorph*, 35 Nebraska, 314; *McComb v. Spangler*, 71 California, 418; *Banning v. Bradford*, 21 Minnesota, 308; 18 Am. Rep. 398; Pomeroy on Remedies, sect. 342.

Contra: *Standish v. Dow*, 21 Iowa, 363: "a proper but not a necessary party."

Sometimes the prior mortgagee is made a party to foreclosure by the junior to obtain a sale of the whole estate and give title thereto to the purchaser clear of mortgage. *Clark v. Prentice*, 3 Dana (Ky.), 468; *Persons v. Alsip*, 2 Indiana, 67; *Evans v. McLucas*, 12 South Carolina, 56; *Waters v. Bossel*, 58 Mississippi, 602; *Vanderkemp v. Shelton*, 11 Paige (N. Y. Ch.), 28; *Ducker v. Belt*, 3 Maryland Chan. 14; *Miller v. Finn*, 1 Nebraska, 254; *Emigrant I. S. Bank v. Goldman*, 75 New York, 127; *Hagan v. Walker*, 14 Howard (U. S. Sup. Ct.), 29; *Bigelow v. Cassidy*, 26 New Jersey Eq. 557. In *Hagan v. Walker*, *supra*, the Court said: "It is true, that in *Finley v. The Bank of the United States* (11 Wheaton's Reports, 306), which was a bill to foreclose a mortgage sale, Chief Justice MARSHALL says: 'It cannot be doubted that the prior mortgagee ought regularly to have been a party defendant, and that had the existence of his mortgage been known to the Court, no decree ought to have been pronounced in the cause until he was introduced into it.' But it could not have been intended by this to say, that a prior encumbrancer was absolutely a necessary party without whose presence no decree of sale could

No. 53. — Palmer v. Earl of Carlisle, 1 Sim. & St. 423. — Rule.

be made, because in that very case the Court refused to treat the decree as erroneous, after it had been executed.

“On the other hand there are cases in which it has been declared that all encumbrancers are necessary parties. Many are collected in Story’s Equity Pleadings, 178, *n*. But we consider the true rule to be, that, where it is the object of the bill to procure a sale of the land, and the prior encumbrancer holds the legal title, and his debt is payable, it is proper to make him a party in order that a sale may be made of the whole title. In this sense, and for this purpose, he may be correctly said to be a necessary party, that is, necessary to such decree. But it is in the power of the Court to order a sale subject to the prior encumbrance, a power which it will exercise in fit cases. And when the prior encumbrancer is not subject to the jurisdiction of the Court, or cannot be joined without defeating its jurisdiction, and the validity of the encumbrance is admitted, it is fit to dispense with his being made a party.”

Story (Eq. Plead., sect. 193), says: “And it may now well be doubted whether in any case it is necessary for a puisne mortgagee, who seeks to sustain a bill of foreclosure against the mortgagor and subsequent mortgagees to himself, to make any prior mortgagee to himself a party.” Citing the principal cases.

No. 53. — PALMER v. EARL OF CARLISLE.
(1823.)

RULE.

THE plaintiff in an action to redeem or foreclose a mortgage must make all parties interested in the mortgage security or in the equity of redemption parties to the action.

Palmer v. Earl of Carlisle.

1 Simon & Stuart, 423-425.

Foreclosure Suit. — Parties.

A person entitled to part only of a sum of money due on mortgage, [423] can not file a bill for a foreclosure of the same part of the mortgaged estate.

There can be no redemption or foreclosure unless the parties entitled to the whole of the mortgage money are before the Court.

One of the questions in this cause was, whether a person who was entitled to a sixth part only of a sum of money due on a mortgage could file a bill for a foreclosure of a sixth part of the mortgaged estate.

By an indenture, dated the 20th of January, 1770, Lord Carlisle assigned certain manors and other hereditaments to Thomas Hanway, subject to redemption on payment of £12,000 and interest, on the 20th of July following.

£2,000, part of the £12,000, belonged to Wm. Hanway, a brother of T. Hanway, and the remainder belonged to T. Hanway.

T. Hanway, by his will, gave to his wife, Ann Hanway, [[†] 424] £2,000, part of the £10,000, for her own use; * and he gave £8,000, the remainder of that sum, to R. Heron and Wm. Painter, upon trust, to pay the interest of it to his wife for her life; and after her decease, to pay the interest of £4,000, part of the £8,000, to his nephew, T. Altham, for his life; and after T. Altham's decease, to that gentleman's widow (if he should leave one) for her life; and after her decease, to pay the principal to T. Altham's children, at the usual periods, in equal shares; and he appointed Jonas Hanway, Richard Heron, and W. Painter executors of his will.

In September, 1772, T. Hanway died. His will was proved by all his executors. Heron was the survivor of them. He died in 1805; and Sir Robert Heron, one of the defendants, was his personal representative. Ann Hanway, T. Hanway's widow, died in 1778.

Thos. Altham died in 1782, leaving the plaintiff, and Thos. Wm. Altham, his only children.

By articles, dated the 17th day of January, 1791, and entered into previously to the plaintiff's marriage with her late husband, it was agreed that all the property, both real and personal, to which the plaintiff was then entitled, should be vested in trustees, in trust to sell, and therewith to discharge the incumbrances then affecting her husband's estates.

T. W. Altham died in 1794, intestate, and the plaintiff took out letters of administration to his estate.

The whole of the £12,000 still remaining unpaid, the plaintiff filed her bill, praying that an account might be taken of [^{*} 425] what was due to her on the mortgage, in * respect of the £2,000, her late brother's share, being a sixth part of the £12,000; and that Lord Carlisle might be decreed to pay what should be found due to her, or be foreclosed from all equity of redemption in one sixth part of the mortgaged premises.

None of the persons who had any interest, either legal or equitable, in the £12,000 except the plaintiff and Sir Robert Heron

were made parties to the suit; nor was any reason assigned in the pleadings for that omission.

Lord Carlisle, by his answer, submitted that an account should be taken of the whole of the £12,000 and not of the £2,000 only; as otherwise he might be put to unreasonable and unnecessary charges in taking many different accounts in respect of the same mortgage.

Mr. Horne, and Mr. Longley, for the plaintiff:—

In *Montgomerie v. the Marquis of Bath*, 3 Ves. 560, a decree was made for a partial foreclosure. The registrar's book has been looked at, in order to see if the decree in that case was made by consent; and it does not appear that that was the case.

Mr. Barber, for Sir Robert Heron.

Mr. Heald, Mr. Wingfield, Mr. Sugden, and Mr. Tinney, for the other parties to the suit.

The VICE CHANCELLOR (SIR JOHN LEACH).

There can be no foreclosure or redemption, unless the parties entitled to the whole mortgage money are before the Court. The bill must be dismissed against Lord Carlisle, with costs.

ENGLISH NOTES.

The person in whom the legal estate is vested must be a party to the action either as plaintiff or defendant. *Smith v. Chichester* (1842), p. 128 *ante* (2 Dr. & War. 404); *Browne v. Lockhart* (1840), 10 Sim. 426. So if the mortgagee died before 1882 his heir-at-law or the devisee of the mortgaged estates must be a party to a foreclosure action by the executors of the mortgagee. *Wood v. Williams* (1819), 4 Madd. 186, 20 R. R. 291; *Hichens v. Kelly* (1855), 2 Sm. & Giff. 264. And conversely the personal representatives must be parties to an action by the heir or devisee of mortgaged estates as they are entitled to the mortgage moneys and interested in the taking of the accounts. *Freaker v. Horseley* (1676), Freem. Ch. Rep. 180. The heir or devisee of a mortgagee dying after 1881 is not generally a necessary party to an action for redemption or foreclosure. 44 & 45 Vict., c. 41, s. 30. If however the mortgagee has been admitted in his lifetime the customary heir or devisee must still be a party. 57 & 58 Vict., c. 46, s. 88.

Where there are several co-mortgagees all must be parties. *Vicars v. Cowell* (1839), 1 Beav. 529. See *Luke v. South Kensington Hotel Co.* (C. A. 1879), 11 Ch. D. 121, 48 L. J. Ch. 361, 40 L. T. 638, 27 W. R. 417.

Trustees, executors, and administrators as a general rule sufficiently represent their beneficiaries and may sue or be sued in foreclosure and

redemption actions without making their beneficiaries parties. *Morley v. Morley* (1857), 25 Beav. 253. See R. S. C. Ord, XVI., s. 8. If the trustee has become bankrupt the beneficiaries must be made parties. *Francis v. Harrison* (1889), 43 Ch. D. 183, 59 L. J. Ch. 248, 61 L. T. 667, 38 W. R. 329.

A puisne mortgagee may foreclose the mortgagor and subsequent mortgagees without making the prior mortgagee or mortgagees parties. *Rose v. Page* (1829), 2 Sim. 471, 29 R. R. 142; *Richards v. Cooper* (1842), 5 Beav. 304.

Generally speaking a mortgagor seeking to redeem only a subsequent mortgage need not make the prior mortgagee a party unless the amount due to the mortgagee to be redeemed cannot be ascertained unless the prior mortgagee is before the Court. *Lord Kensington v. Bouverie* (1852), 16 Beav. 194.

All subsequent mortgagees must be made parties to an action for foreclosure brought by a prior mortgagee whether legal or equitable. *Tyler v. Webb* (1843), 6 Beav. 552; *Adams v. Paynter* (1844), 1 Coll. 530, 14 L. J. Ch. 53; *Johnson v. Holdsworth* (1850), 1 Sim. (N. S.) 106, 109. And the same rule applies to a mortgagor seeking to redeem a prior mortgage. *Waters v. Mynn* (1850), 14 Jur. 341. As to judgment creditors see *Mildred v. Austin* (1870), L. R. 8 Eq. 220, 20 L. T. 939, 17 W. R. 638; *Earl of Cork v. Russell* (1871), L. R. 13 Eq. 210, 41 L. J. Ch. 226, 26 L. T. 230.

Subsequent mortgagees cannot redeem without making the mortgagor, or his heir, a party to the action, in order to foreclose him: *Thompson v. Baskerville*, 3 Rep. in Ch. 215; *Fell v. Brown* (1787), 2 Bro. C. C. 276; and if the heir be not within the jurisdiction of the Court, the cause cannot proceed, because the decree is, that the second mortgagee shall redeem the first, and the mortgagor, or his heir, shall redeem the second or be foreclosed. See *Palk v. Lord Clinton* (1805), 12 Ves. 48, 8 R. R. 283.

A sub-mortgagee seeking to foreclose the original mortgage must make the mortgagee or his personal representatives parties. *Hobart v. Abbot* (1731), 2 P. Wms. 642. And the mortgagor need not be made a party to an action by a sub-mortgagee to foreclose the original mortgage. See Seton on Decrees, 1733.

The mortgagor or his heir is generally a necessary party to an action for foreclosure. *Lloyd v. Lander* (1821), 5 Madd. 282, 21 R. R. 292; *Farmer v. Curtis* (1829), 2 Sim. 466, 29 R. R. 140. But if the mortgagor is bankrupt he is not a proper party, but the Official Receiver or the trustee in bankruptcy must be made a party in his place. *Lloyd v. Lander*, *supra*; *Hanson v. Preston* (1838), 3 Y. & C. Ex. 229. See Bankruptcy Act, 1883 (46 & 47 Viet., c. 62), ss. 54, 56.

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Before Locke King's Act the personal representatives of the mortgagor were necessary parties. *Scholefield v. Heafield* (1836), 7 Sim. 667. But this is now no longer the case where the mortgage is of freeholds in fee or for a term of years, unless the mortgaged estate is insufficient to satisfy the debt, or is to be exonerated out of the personalty.

Where the mortgage is of leaseholds or other personalty, the personal representatives of the deceased mortgagor are of course necessary parties to a foreclosure action. *Wilton v. Jones* (1843), 2 Y. & C. C. C. 244. But if necessary a personal representative must be constituted. *Aylward v. Lewis*, 1891, 2 Ch. 81, 64 L. T. 250, 39 W. R. 552.

If the mortgagor died on or after the 1st January, 1898, it would seem that his heir or devisee is still a necessary party, and that until assent or conveyance to him, the personal representatives must also be made parties. See 60 & 61 Vict., c. 65, s. 1 (1), s. 3 (1).

In an action to foreclose two or more properties which are subject to the same mortgage, all the owners of the several properties must be made parties whether the equities of redemption were severed at the time of the mortgage or subsequently thereto. *Stokes v. Clendon* (1790), 3 Swanst. 150 n., 19 R. R. 188; *Payne v. Compton* (1837), 2 Y. & C. Ex. 457.

A person having only a partial interest in property comprised in a mortgage cannot maintain an action for redemption without making the other persons interested parties. *Cholmondeley v. Lord Clinton* (1820), 2 J. & W. 1, at p. 134, 22 R. R. 84; *Henley v. Stone* (1840), 5 Beav. 355; *Chappell v. Rees* (1852), 1 DeG. M. & G. 393; *Bolton v. Salmon* 1891, 2 Ch. 48, at p. 52, 60 L. J. Ch. 239, 64 L. T. 222, 39 W. R. 589.

Where a mortgaged property is settled the mortgagee seeking to foreclose must make the tenant for life or all the successive tenants for life, and also the first tenant in tail or other reversioner, parties. *Gore v. Starpoole* (1813), 1 Dow. 18, 14 R. R. 1; *Sutton v. Stone* (1740), 2 Atk. 101. If he does so, the decree will bind all the remaindermen or reversioners: *Yates v. Hambly* (1741), 2 Atk. 237; even though the first tenant in tail is an infant. *Reynoldson v. Perkins* (1769), Amb. 564.

All purchasers of the equity of redemption must be made parties to an action for foreclosure. *Peto v. Hammond* (1860), 29 Beav. 91.

See further as to the necessary parties to redemption and foreclosure actions. Robbins on Mortgages, Vol. I., pp. 720 *et seq.*, Vol. II., pp. 1003 *et seq.*

AMERICAN NOTES.

This case is cited in 2 Jones on Mortgages, sect. 1368, and the principle is accepted here except in the case of prior mortgagees and incumbrancers, who

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are not necessary and probably not proper parties, for the estate may be sold subject to their rights. (See notes, *ante*, No. 52.) See *Pine v. Shannon*, 30 New Jersey Eq. 501; *Noyes v. Sawyer*, 3 Vermont, 160; *Pogue v. Clark*, 25 Illinois, 333; *Shirkey v. Hanna*, 3 Blackford (Ind.), 403; 26 Am. Dec. 426; *Stucker v. Stucker*, 3 J. J. Marshall (Ky.), 301; *Woodward v. Wood*, 19 Alabama, 213; *Clark v. Reyburn*, 8 Wallace (U. S. Sup. Ct.), 318; *Boomer v. Sturges*, 58 New York, 168; *Chase v. Abbott*, 20 Iowa, 151; *Stark v. Brown*, 12 Wisconsin, 572; 78 Am. Dec. 762; *Goodman v. White*, 26 Connecticut, 317; *Mannf. Co. v. Price*, 4 South Carolina, 338; *Hefner v. Urton*, 71 California, 479; *Sellwood v. Gray*, 11 Oregon, 534; *Wilson v. Russ*, 17 Florida, 691; *Bal-lard v. Carter*, 71 Texas, 161; Pomeroy on Remedies.

Unless otherwise provided by statute, to cut off dower, the wife of the mortgagor, who has joined in the mortgage, must be made a defendant. 2 Jones on Mortgages, sect. 1420, and cases cited. And although it is not necessary that she should join in a purchase money mortgage, yet she must be made a party to a suit in equity for foreclosure to cut off her right. *Mills v. Van Voorhies*, 20 New York, 412. (But see *Brackett v. Baum*, 50 *ibid.*, 8.)

See a very elaborate examination, 8 Am. & Eng. Enc. of Law, p. 206.

Pomeroy (Remedies, sect. 330), gives this test for the ascertainment of parties: "In an action to foreclose a mortgage, the owner of the land covered by it is a necessary defendant, because without his presence no decree can be made for the sale of the land; in other words, no effective decree at all, and the suit would be an empty show of litigation. The holders of subsequent mortgages, judgments, and other liens upon the same land are not necessary parties in order to the rendition of an effective judgment, because the land can be sold without their presence and without cutting off their liens. If however the plaintiff desires to settle all the questions involved in one controversy, and to determine the rights of all the persons who have any interest in the land, he must bring in all these holders of subsequent liens, so that a judgment may be given which shall foreclose their rights. To accomplish this end, these persons must be made defendants; and in that respect they are necessary parties, — that is, necessary in order to attain the particular result desired. They are not, however, necessary to the decision of the main issues involved in the suit and to the granting of a decree. If we use language accurately, we shall call them proper parties, and shall thus distinguish them from the other class, without whom the judicial machinery cannot be put in motion. Every person who is rightly joined as a defendant in an equitable action, is, in a certain broad sense, a *necessary* party, because his presence is necessary to accomplish some particular end, and to make the judgment more complete than it otherwise would have been; but to use the term in this broad sense is to lose all the benefits of an accurate classification and of practical rules depending on such classification. To sum up: Necessary parties defendant are those without whom no decree at all can be rendered; proper parties defendant are those whose presence renders the decree more effectual; and *all* the proper parties are those by whose presence the decree becomes a complete determination of all the questions which can arise, and of all the rights which are connected with the subject-matter of the controversy. A practical test will at

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once fix the class into which any given persons interested in an equitable litigation must fall. If the person is a necessary defendant, a demurrer for defect of parties on account of his nonjoinder will be sustained; and conversely, if the demurrer will be sustained, the person is merely a *proper* party, such a demurrer will not be sustained on account of his nonjoinder, although the Court may undoubtedly in the exercise of its discretion order him to be brought in."

No. 54. — **PARKER v. HOUSEFIELD.**

(1834.)

RULE.

EQUITY regarding a mortgage as security only will not decree an immediate foreclosure, but will always give to a mortgagor, whether the security is legal or equitable, time to procure the mortgage money before foreclosing him.

Parker v. Housefield.

2 My. & K. 419-422.

Foreclosure. — Time allowed to Redeem.

In the decree upon a bill by an equitable mortgagee, the equitable [419] mortgagor will be allowed six months to redeem the deposited deeds.

The bill had been filed to obtain the benefit of an equitable mortgage by the deposit of title-deeds in the hands of the plaintiff, and the decree, as drawn up by the registrar, directed payment by the defendant of the sum which should be found due to the plaintiff for principal and interest, within six months after the Master should have made his report. The decree went on to direct a reconveyance of the mortgaged premises by the plaintiff, upon such payment by the defendant as aforesaid, and a foreclosure in default of payment.

Mr. Pemberton insisted that the plaintiff was entitled to an immediate sale of the estate, the title-deeds of which had been deposited, and he referred to *Pain v. Smith*, 2 My. & K. 417. The registrar had treated the equitable mortgage as if it had been a legal mortgage, directing a reconveyance upon payment of the mortgage-money and interest where there had been no con-

veyance, and there was, consequently, nothing to re-convey; and further directing a foreclosure in default of payment, when the remedy to which the plaintiff was entitled was a sale. The period of six months allowed for payment in the case of a legal mortgage, was as inapplicable to an equitable mortgage, as the other directions respecting a reconveyance and foreclosure.

Mr. Girdlestone, jun., *contra*, contended that the defendant [* 420] was entitled to be allowed six months to redeem * the deposited deeds, and he relied upon the form of the decree in *Smith v. Nelson*, Seton's Forms of Decrees, p. 180, which was a bill by an equitable mortgagee, where the defendant was ordered to pay within six months, and afterwards, upon default, there was a further order for a sale.

Mr. Pemberton, in reply.

The MASTER OF THE ROLLS (Sir C. PEPPS):—

The question was, whether, in the case of an equitable mortgage by a deposit of title-deeds, the decree ought to give to the mortgagor six months to redeem, as in cases of legal mortgages. To determine this, it is material, in the first place, to consider in what light Courts of equity view such equitable mortgages; and it appears that a deposit of title-deeds has always been considered as an imperfect mortgage, which the mortgagee is entitled to have perfected, or rather as a contract for a mortgage, which, according to the well known doctrine of Courts of equity, would give to the party claiming the benefit of such contract all such rights as he would be entitled to if the contract had been completed. Accordingly, in the very commencement of the doctrine of equitable mortgages, viz., in the cases of *Featherstone v. Fenwick*, in the year 1784, and *Harford v. Carpenter* in the year 1785, both cited in *Russel v. Russel*, 1 Bro. C. C. 269, we find Lord THURLOW saying, that a deposit of deeds entitled the holder to have a mortgage, and to have his lien effectuated. In [* 421] *Birch v. Ellames*, 2 Anst. 427 (3 R. R. 601), the CHIEF BARON of the Exchequer says, "A deposit of title-deeds as security for a debt is now settled to be evidence of an agreement to make a mortgage, and such agreement is to be carried into execution by the Court." The decree in that case was, that the defendant should pay, or stand foreclosed and convey. In *Ex parte Wright*, 19 Ves. 255, Lord ELDON says, that a deposit of title-deeds was evidence of an agreement for a

mortgage, and that an equitable title to a mortgage was, in equity, as good as a legal mortgage. Such being the light in which Courts of equity view equitable mortgages by deposit of title-deeds, it would seem to follow that the remedy to be afforded to such mortgagees should as nearly as possible correspond with that to which legal mortgagees are entitled; and, accordingly, from the search which I have directed to be made as to the form of decrees upon such subjects, I find that such has been the principle adopted. In *Newton v. Aldous* (18th of July, 1804), the decree, which appears to have been penned by Lord ELDON himself, was as follows: — “Declare that the title-deeds relating to the estate in question, having been deposited by the said John Aldous, the bankrupt, in the hands of the plaintiff, the plaintiff is entitled to be considered, in this Court, as if he was a mortgagee of the premises therein comprised, and decree the same accordingly, and refer it to the Master to take an account of what is due for principal money advanced on the said deposit, and for interest thereon, and to tax his costs of this suit. And declare that such principal, interest, and costs are to be considered as a charge upon the said premises. And upon the defendant, William Tolley, paying unto the plaintiff, within six months after the Master shall have made his report at, * &c., let the plain- [* 422] tiff deliver up all deeds, &c. But declare that in default, &c., plaintiff will be entitled to the said premises, free and clear of all right, title, interest, and equity of redemption of, as, and to the same, and to have an absolute reconveyance thereof accordingly. And in that case, let the defendant execute such conveyance thereof to the plaintiff, to be settled by the Master in case the parties differ; with liberty to apply,” &c. In *Lavender v. Roberts* (28th of June, 1806), *Warren v. Barling* (10th of April, 1818), and *Langdon v. Wilmot* (25th of February, 1828), the decree was in the same form.

In *Meune v. Ferne* (5th of February, 1818), and *Spring v. Allen*, (12th of February, 1830), a sale was directed instead of a foreclosure; but in both these cases the mortgagor was allowed six months to pay the debt.

It appears, therefore, that, upon the only point before me, namely, whether, in case of an equitable mortgage by deposit of title-deeds, the mortgagor shall be allowed six months to redeem. the precedents are uniform in favour of his being allowed that

time; and that such practice is strictly conformable to the principles and doctrine of the Court upon the subject.

I am, therefore, of opinion that the decree must be drawn up, giving the mortgagor six months to redeem.

ENGLISH NOTES.

The rule above stated applies even though the defendant makes default in appearance. *Patey v. Flint* (1879), 48 L. J. Ch. 696. For the ordinary form of decree, see Seton on Decrees (5th ed.), p. 1575; for a form of decree where the mortgagee is by deposit of decree, see *ibid.*, 1695.

The price of redemption is the same in actions of foreclosure as in actions of redemption. *Du Vigier v. Lee* (1843), 2 Hare, 326. In either case the practice is to give six months for redemption from the date of the certificate fixing the amount due on the mortgage. *Parker v. Housefield*, *supra*; *Lister v. Turner* (1846), 5 Hare, 281, 293. As a general rule one period only is given in the first instance. *Smithett v. Hesketh* (1891), 44 Ch. D. 161, at p. 164, 59 L. J. Ch. 567, 62 L. T. 802, 38 W. R. 698.

Successive periods of three months may however be given to several subsequent incumbrancers if their respective priorities are admitted, but not otherwise. *Bartlett v. Rees* (1871), L. R. 12 Eq. 395, 40 L. J. Ch. 599, 25 L. T. 373, 19 W. R. 1046; *Smithett v. Hesketh*, *supra*.

Where there are separate redemptions, the second mortgagee must redeem the first or be foreclosed. *Whitworth v. Rhodes* (1850), 20 L. J. Ch. 105. If the second mortgagee is foreclosed a fresh account is taken and the third mortgagee may redeem the first on the footing of that account, and in default is foreclosed, and so in succession. *Elton v. Curteis* (1881), 19 Ch. D. 49, 51 L. J. Ch. 60, 45 L. T. 435, 30 W. R. 316; *Bingham v. King* (1865), 14 W. R. 414.

The period originally granted for redemption may, if sufficient grounds for further indulgence are shown, be enlarged. *Eyre v. Hanson* (1840), 2 Beav. 478; *Jones v. Creswick* (1839), 9 Sim. 304; *Renoulez v. Cooper* (1823), 1 Sim. & St. 364; *Cheston v. Wells*, 1893, 2 Ch. 151, 62 L. J. Ch. 468, 68 L. T. 197, 41 W. R. 374.

By the Chancery Amendment Act (15 & 16 Vict., c. 86), s. 48, now repealed, statutory jurisdiction was given to the Court of Chancery to order a sale in foreclosure actions. And now by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 25, the Court has power to order a sale either in a redemption action or in a foreclosure action. Independently of statute the Court of Chancery had an inherent jurisdiction to order sale in lieu of foreclosure, which in the case of an adult mortgagor was exercised very sparingly, and as a rule

No. 54. — *Parker v. Housefield.* — Notes.

only in favour of the mortgagee, as in the case of an advowson: *Gardiner v. Griffith* (1726), 2 P. Wms. 403; or of a reversion: *Slade v. Rigg* (1843), 3 Hare, 35. In the case of infants however, of recent years, the practice has been to direct a sale, if it appears on reference to Chambers or otherwise that a sale would be for the infants' benefit. *Davis v. Dowding* (1838), 2 Keen, 247, 7 L. J. (N. S.), Ch. 169.

Acting on the principle of the rule above stated, the Court will not order an immediate sale except under special circumstances but will give to the mortgagor a fixed time after the accounts are certified, for redemption. *Smith v. Robinson* (1853), 1 Sm. & G. 140; *Wade v. Wilson* (1882), 22 Ch. D. 235, 52 L. J. Ch. 399, 47 L. T. 696, 31 W. R. 237. See *Foster v. Harvey* (1863), 4 DeG. J. & S. 59.

AMERICAN NOTES.

The practice on this point is generally regulated by statute. In strict foreclosure the Court fix a time by the decree within which the debt is to be paid, which time is discretionary with the Court. *Johnson v. Donnell*, 15 Illinois, 97; *Clark v. Reyburn*, 8 Wallace (U. S. Sup. Ct.), 318. If the debt is not paid within that time, the mortgagor's equity of redemption is barred and the Court will issue process to put the mortgagee in possession.

Strict possession however obtains in a few States, in exceptional circumstances, namely: Alabama, California, Illinois, Minnesota, New York, and Wisconsin. It is the usual mode in Connecticut and Vermont. In Maine, New Hampshire, Massachusetts, and Rhode Island the remedy is entry and possession. 8 Am. & Eng. Enc. of Law, p. 187. The common mode is sale under a decree in a suit for foreclosure.

In *Moulton v. Cornish*, 138 New York, 140; 20 Lawyers' Reports Annotated, 370, the Court said: "The equitable remedy known as a strict foreclosure of a real property mortgage, has never been recognized in this State, save in a very limited class of cases.

"In England it was the prevailing method of procedure, until the enactment of the statutes of 15 & 16 Victoria, c. 86 (s. 48), known as the Chancery Improvement Act. It had its root in the common law doctrine, that upon the execution of the mortgage, the mortgagee acquired the fee of the land, and upon default in payment, a right to the possession, and the mortgagor had no estate or interest therein, and no right of possession, after default had been made in the payment of the mortgage debt. The mortgagee's remedy was by ejectment, and in a court of law it was not an available defence for the mortgagor to plead that he was willing and ready to pay the debt, if he had once suffered a default to occur. In order to mitigate the hardships of this relation, equity permitted the mortgagor and his privies to redeem by discharging the mortgage debt, and by restoring to him the possession of the land if the mortgagee had taken possession. As it might be uncertain whether the mortgagor or subsequent lienors would ever avail themselves of the right of redemption, it was, while outstanding, a serious impediment to the alienation of the mortgaged property, and equity would, therefore, entertain an action to

No. 55. — Detillin v. Gale, 7 Ves. 583. — Rule.

compel the parties entitled to this right, to exercise it by paying within a reasonable time the amount of the mortgage debt, or be forever barred or foreclosed of the right of redemption; and in case of redemption, the decree provided that the mortgagee should reconvey the lands to the mortgagor, or other party redeeming.

“This proceeding has been termed a strict foreclosure, but it is apparent that it has no appropriate place in the system of the laws and jurisprudence where it has been declared that the mortgage does not operate as a conveyance of the legal title, but is only a chose in action constituting a lien upon the land as security for the debt or other obligation of the mortgagor. The Courts of this State have refused to adopt it as an authorized remedy in ordinary cases, and in this respect have followed the practice of the civil, rather than of the common law. In the American and English Encyclopædia of law (vol. 8, 186-7. tit. Foreclosure) it is stated that strict foreclosure is very rarely resorted to in the American Courts: that in a large majority of the States it is not recognized; that in two it is the usual mode of procedure; and that in six of the States, including New York, it is permitted in exceptional cases.”

No. 55. — DETILLIN v. GALE.

(1802.)

RULE.

THE right of a mortgagee to the costs of and incident to an action for redemption or foreclosure arises out of the mortgage contract itself, and can only be lost by such inequitable conduct on the part of the mortgagee as to amount to a violation or culpable neglect of duty under the contract.

Detillin v. Gale.

7 Vesey, 583-587 (6 R. R. 192).

Mortgage. — Improper Conduct. — Loss of Costs.

[583] Mortgagee, though entitled to costs in general, deprived of costs occasioned by improper conduct; and even compelled to pay costs.

Bill for a general account lies against a solicitor and agent, taking a security without a settlement of accounts.

The bill in this cause, among other objects, prayed a redemption and account against the defendant Sidney; who, having been employed by the plaintiff as his solicitor and agent, took a bond and judgment and a mortgage for his bill without any settlement

of accounts between them. An inquiry having been directed as to what was due to the defendant upon his securities and otherwise great delay and expensive litigation was *occa- [* 584] sioned by his conduct, before any account could be procured from him; and finally his demand was reduced by a great deal more than a sixth. The plaintiff pressed for a general account against him, with rests, and also for costs. For the defendant it was insisted, that there was no instance of making a mortgagee pay costs, and that in that character he was entitled to his costs.

Mr. Richards and Mr. Hall, for the plaintiff; Mr. Piggott and Mr. Fonblanque, for the defendant.

The LORD CHANCELLOR (Lord ELDON):—

Upon the transactions and circumstances of this case a bill might have been filed, that would have called for the decree now prayed; the defendant, standing in the character of attorney and solicitor, and general manager, converting the debt from his client into a mortgage and judgment, when the accounts were unsettled and the balance might be doubtful. A bill producing that state of circumstances, and alleging, that it was against the duty of the defendant, in his character of agent, to take a security carrying interest, instead of discharging the demand by the money of his employer, as received by him, might have been filed, to have a decree for a general account, without regard to the security; and that in that account interest should not be allowed on one side, and not upon the other. The first obligation upon the defendant, standing in that relation to the plaintiff, is, a duty upon this part perfectly easy, that his accounts ought to have been quite clear. The conclusion upon his answer to this bill for an account, that his accounts would not be ready for six weeks, is, that he had not done his duty. *Newman v. Payne*, 2 Ves. jr. 199.

It is said, because he is a mortgagee he is to have his costs. That is not of necessity. *Primâ facie* he is to have them certainly. The owner coming to deliver the *estate from [* 585] that incumbrance he himself put upon it, the person having that pledge is not to be put to expense with regard to that; and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified. But that principle does not go to such a case as this: the solicitor an incumbrancer with regard to law expenses; taking a bond and judgment for his bill. The expense

of the suit as to that is not incurred by the mortgagor in delivering his estate from a demand admitted to be just: on the contrary, the great expense of the suit is incurred in a successful endeavour of the mortgagor to prove, what he has established, that the defendant charged him with a great deal more than he ought; and, the Court having taken off a great deal more than a sixth part of his bill, there is no doubt I act equitably, following the principle of the legislature, by saying, that as to so much of the suit as relates to that bill he shall pay the costs.

It was pressed, that I should now direct the account, with rests, and, farther, call upon him to pay costs as mortgagee. Upon the allegations of this bill the shape of the record is an objection to directing the account in that manner; and I should take from him the opportunity of answering, as the justice of the case should require, that the interest account upon the one side and the other should be taken.

It is then asked, is he to have his costs as far as he is mortgagee? Though a mortgagee, acting reasonably as such, is to have his reasonable expenses, it does not follow, that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts, which upon his part are not only unreasonable

but grossly oppressive. He was under an obligation to bring [*586] into the Master's office clear accounts capable of *being clearly vouched; for he is not a mere mortgagee; but became so in consequence of his transactions as agent. Is he to charge the estate with all the expense attending a useless and unnecessary litigation in the Master's office? He is not therefore entitled to his costs in this cause as mortgagee. It is a very different consideration, whether, being a mortgagee, he is to pay the costs of the mortgagor: if any, it is to be considered, what costs; for the suit goes to other accounts with other incumbrances; and to points, as to which to a certain extent he must have had costs. It is admitted, there is no instance, in which a mortgagee has been called upon to pay costs; and it is clear, as to some, he cannot; for some are the necessary effect of the suit to redeem. It is said, it will be an extremely bad precedent to hold, that in any case a mortgagee can be called upon to pay the costs of the mortgagor. I will not say, the Court will not, and am very far from saying, the Court ought not, to make that precedent; but it ought to be made upon great consideration; for though it is a very clear moral proposition, that

the mortgagee ought to pay all costs his unnecessary and oppressive dealings have occasioned, yet I have learned, that there may be great wisdom in a general rule established for a great length of time; though perhaps at the instant it is considered that may not be discovered. The costs of the inquiry as to what was due must be paid by him, and when the course of his proceedings from the answer, till the cause came here, is stated to me beyond all possibility of contradiction, it would be a disgrace to the Court to give him the costs incurred by such conduct. I will give him his costs down to the answer, and no farther.

A few days afterwards the LORD CHANCELLOR observed that in the case of *Shuttleworth v. Lowther*, the late * Lord [* 587] Lonsdale, a mortgagee, was made to pay costs on the ground of a tender, and an appropriation of the money; which was paid into the bank, and refused.

ENGLISH NOTES.

It is a settled rule that costs properly incurred by the mortgagee in relation to his security must be allowed to him and added to the moneys secured by the mortgage as if originally secured thereby so as to rank in priority to all persons claiming under the mortgagor including subsequent incumbrancers and the trustee in the mortgagor's bankruptcy. *Lomax v. Hyde* (1690), 2 Vern. 185; *Dryden v. Frost* (1838), 3 My. & Cr. 670, 675; *Barnes v. Raester* (1842), 1 Y. & C. C. C. 401; *Dunston v. Paterson* (1847), 2 Ph. 341; *National Provincial Bank of England v. Games* (C. A. 1886), 31 Ch. D. 582, 592, 55 L. J. Ch. 576, 54 L. T. 690, 34 W. R. 600.

The right of a mortgagee to costs is an exception to the rule that costs are within the discretion of the judge against which no appeal will lie. *Cotterell v. Stratton* (C. A. 1872), L. R. 8 Ch. 295, 42 L. J. Ch. 417; *Turner v. Handcock* (C. A. 1882), 20 Ch. D. 303, 51 L. J. Ch. 517, 46 L. T. 750, 30 W. R. 480; *Charles v. Jones* (C. A. 1886), 33 Ch. D. 80, 56 L. J. Ch. 161, 55 L. T. 331, 35 W. R. 88.

As a general rule an equitable mortgagee is entitled to the same costs as a legal mortgagee. *Lewis v. John* (1838), 9 Sim. 366. An exception to the rule prevails in bankruptcy in the case of a mortgagor by deposit of deeds without a memorandum in writing: *Ex parte Brightens* (1818), 1 Swanst. 3.

A mortgagee is entitled to his costs of and incident to an action of redemption or foreclosure, but if he claims any further costs or expenses he must show sufficient grounds for his claim, and an inquiry must be

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ordered as to such further costs or expenses. *Merriman v. Bonner* (1864), 10 Jur. (N. S.) 534, 10 L. T. 88, 12 W. R. 461; *Tipton Green Colliery Co. v. Tipton Moat Colliery Co.* (1877), 7 Ch. D. 192, 47 L. J. Ch. 152, 26 W. R. 348; *Bolingbroke v. Hinde* (1884), 25 Ch. D. 795, 53 L. T. 704, 32 W. R. 427.

Just allowances are however made without any direction in the decree. R. S. C. Ord. XXXIII, s. 8.

As to what are just allowances, see *Blackford v. Davis* (1869), L. R. 4 Ch. 304, 20 L. T. 199, 17 W. R. 336; *Wilkes v. Saunton* (1877), 7 Ch. D. 188, 47 L. J. Ch. 150; *Rees v. Metropolitan Board of Works* (1880), 14 Ch. D. 372, 49 L. J. Ch. 620, 42 L. T. 685, 28 W. R. 614.

It would seem that a mortgagee cannot claim costs of investigating the mortgagor's title in the absence of special stipulation. *Greig v. Slater* (1856), 22 Beav. 314; *National Provincial Bank of England v. James, supra.*

A mortgagee will generally be allowed all costs and expenses properly incurred by him in maintaining or defending his rights or enforcing his security. *Ellison v. Wright* (1827), 3 Russ. 458, 27 R. R. 108; *Pelly v. Wathen* (1851), 1 DeG. M. & G. 16. See *Ford v. Earl of Chesterfield* (1856), 21 Beav. 426; *Batten Croffit & Scott v. Dartmouth Harbour Commissioners* (1890), 45 Ch. D. 612, 59 L. J. Ch. 700, 62 L. T. 861, 38 W. R. 603.

So a mortgagee will be entitled to his expenses for an abortive attempt to sell under his power. *Corsellis v. Patman* (1867), L. R. 4 Eq. 156, 16 L. T. 446, 15 W. R. 828; *Farrer v. Lacey, Hartland & Co.* (C. A. 1885), 31 Ch. D. 42, 55 L. J. Ch. 149, 53 L. T. 515, 34 W. R. 22.

A mortgagee in possession will be allowed all payments representing outgoings incident to his possession. *White v. City of London Brewery Co.* (C. A. 1889), 42 Ch. D. 237, 58 L. J. Ch. 855, 38 W. R. 82. He will be allowed his costs of necessary repairs and even of improvements which have increased the value of the property. *Shepard v. Jones* (1882), 21 Ch. D. 469, 47 L. T. 604, 31 W. R. 308; *Henderson v. Astwood* (P. C.) 1894, A. C. 150, 163. But the improvements must not be such as to improve the mortgagor out of his property. *Sandon v. Hooper* (1844), 14 L. J. Ch. 120.

A mortgagee has been allowed payments of fire insurance premiums on default of the mortgagor to pay them pursuant to his covenant to insure. *Scholefield v. Lockwood* (1862), 11 W. R. 555. But see *Dobson v. Land* (1851), 4 DeG. & Sm. 575. *Brooke v. Stone* (1865), 34 L. J. Ch. 251. Where the mortgage was made by deed since 1881, the mortgagee has a statutory power to insure. 44 & 45 Vict., c. 41, s. 19.

A mortgagee will be refused his costs, if he is guilty of fraudulent

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and unfair dealing or other unreasonable conduct. *Cliff v. Wadsworth* (1843), 2 Y. & C. C. C. 598; *West v. Jones* (1851), 1 Sim. (N. S.) 205; *Credland v. Potter* (C. A. 1874), L. R. 10 Ch. 8, 44 L. J. Ch. 169, 31 L. T. 522, 23 W. R. 36.

If the mortgagee has been guilty of very gross misconduct he may not only be deprived of his costs, but may be made to pay the costs of other parties. *Roberts v. Williams* (1844), 4 Hare, 129.

AMERICAN NOTES.

This case is cited in 2 Jones on Mortgages, sect. 1602, to the doctrine that where the mortgagee oppressively demands more than his due, costs may be denied him, or even awarded against him. See *Saunders v. Frost*, 5 Pickering (Mass.), 159; 16 Am. Dec. 394; *Large v. Van Doren*, 14 New Jersey Eq. 208. In *Froom v. Ditmas*, 4 Paige (N. Y. Ch.), 526; *Van Buren v. Olmstead*, 5 ibid. 9, it was held that where redemption was improperly resisted, costs might be awarded against the mortgagee.

Costs are discretionary: *Gar v. Bright*, 1 Barbour Ch. (N. Y.), 157; but rarely refused to the mortgagee or his assignee: *Eastburn v. Kirk*, 2 Johnson Ch. (N. Y.) 317.

SECTION VII. — *Priorities.*

On this subject see also Nos. 5-9 of "EQUITABLE TITLE," 10 R. C. 478-570.

No. 56.—EARL OF BRISTOL v. HUNGERFORD.

(1705.)

No. 57.—BAILEY v. BARNES.

(C. A. 1893.)

RULE.

THE general rule of equity, with regard to the priorities as between themselves of equitable incumbrancers, is that they rank in priority of date: *qui prior est tempore potior est jure*.

But as between a person holding the legal title and one having an equitable title, the general rule is that the legal title prevails.

Earl of Bristol v. Hungerford.

2 Vern. 524-526.

Competition of Mortgages. — Ceteris paribus, determined by Priority of Time.

[524] A. in 1687, lends £1000 to B. on a judgment, at which time there was a term of years attendant on the inheritance, which had been assigned to three trustees. In 1688, B. and one of the trustees assigned the term to C. for securing money then borrowed of him. A. having notice of this assignment, gets an assignment of the term from the two other trustees to D. in trust for the better securing his £1000. A. shall be paid before C.

Mortgages are not to be preferred to other real incumbrances; but mortgages, judgments, statutes, and recognisances shall be paid according to priority.

Sir William Bassett, in 1687, borrowed £1000 of the Lady Biddulph on a judgment; at that time there was a term of 500 years kept on foot, and assigned to Neville, Lady Biddulph, and Simon Biddulph to attend the inheritance. Afterwards in 1688, Sir William Bassett and Neville, one of the three trustees, assigned the term to Windham and Millington, for securing £1500 borrowed of them by way of mortgage; and afterwards Sir William Bassett, together with the two other trustees, viz. the Lady Biddulph and Simon Biddulph, assign the term to Garrett, in trust for the better securing the £1000 due to the Lady Biddulph.

It was now made a question, whether Windham and Millington should have the benefit of the whole term, or only of a third part, there being but one of the three trustees that joined in the assignment; and it was insisted, that although but one third part passed, as to the legal estate, yet the *cestui que trust* could [525] make a good assignment in equity; and the Lady Biddulph ought to be bound thereby, because she lent her money on the credit of the judgment, and before the assignment to Garrett had notice of the assignment to Windham and Millington.

LORD KEEPER: — Although there is a term attendant on the inheritance, yet a judgment is an equitable lien on the inheritance, and consequently affects the term: and therefore the Lady Biddulph having got the legal estate as to two thirds of the term in Garrett, in trust of herself, shall have the benefit thereof, although she had notice of the mortgage and assignment made by the *cestui que trust* with one of the trustees, and the mortgage-term being created in 1679, all mesne incumbrances were post-

No. 56. — Earl of Bristol v. Hungerford, 2 Vern. 525.

poned to the debt of the Lady Biddulph, and of Windham and Millington.¹

In this case first decreed at the Rolls, mortgages were to be paid in the first place, and then judgments, and then recognisances, &c., but upon an appeal to the Lords, it was adjudged, that mortgages were not to be preferred to other real incumbrances: but mortgages, judgments, statutes and recognisances, should take place according to priority, and as they stood in order of time.

¹ As to Lady Biddulph's claim, the words of the decree are: "His Lordship declared that the judgment confessed by the said Sir William Bassett to the said Lady Biddulph in Michaelmas Term, 1687, for £2000 which is prior to the said Windham and Hill's (the executor of Millington) demand, is a lien on the said lease attendant on the inheritance, and that as far as the penalty of the judgment extends, the executors and assigns of the said Lady Biddulph ought to be paid what is due to her precedent to the mortgage, and that what the penalty of the said judgment will not extend to pay, must be paid out of and by the said assigned mortgage, as it stands in priority as to two thirds thereof, and also declared that the right of the said mortgage and money arising by sale of the said two farms (the premises comprised in the term of 500 years mentioned in the printed report) as to one third of the money is in the said Windham and the executors of the said Hill, and as to the other two thirds is in the said John Garrett, trustee for the said Lady Biddulph, her executors and assigns; and if any judgment shall appear prior to the Lady Biddulph's judgment in 1687, and subsequent to the term granted on the 10th June, 1699, the Lady Biddulph is to have a priority, and take place as to two thirds thereof." As to Symonds's security, there appears to have been two demands made by his widow and executrix, "one for the sum of £570 principal money, lent by William Symonds, her late husband, to the said Sir William Bassett in Sept. 1690; secured by an indorsement on a mortgage formerly made by the said Sir William Bassett, of the Manor or Lordship of Norton Malereward, 20th March, 1687, and the other as assignee of a judgment

from the executors of James Dobson, who were the assignees of one Chs. Broome, who was administrator of one Henry Broome, on the pleadings mentioned for the sum of £1000 debt, and £3 10s. 8d. costs, which said assignment of the said judgment the said Mrs. Symonds obtained *pendente lite*." And as to these, the decree declared, "that as to what is due to the said Mrs. Symonds as assignee of the executors of Dobson, she ought to have the benefit of the said judgment of £1003 10s. 8d. from the time the said judgment was obtained in Trin. Term, 1678, for securing and satisfying what was due to her for principal and interest as assignee of the executors of the said Dobson, of a certain mortgage in the pleadings mentioned to be made to him 25th Dec., 1679; but as to what is due to her for principal and interest as executor of her said husband William Symonds, she the said Mrs. Symonds ought not to have the benefit of the said judgment, but only of the security which her husband had, dated 20th March, 1687, and doth order the same accordingly." Reg. Lib. 1705. A. fol. 513. Note, in this case one Edward Hoblin was in Court at the hearing of the cause, and alleged that he together with his brother Thomas Hoblin were creditors of the said Sir William Bassett by mortgage, and were no parties to the suit, and praying the benefit of the decree. It was thereupon ordered that the said Edward and Thomas Hoblin, and all other the creditors of the said Sir William Bassett, should be at liberty to come in and prove their debts before the Master and have the benefit of the decree, they contributing their proportions to the expenses of the suit. R. L. *ub. sup.* fol. 513, near the bottom.

No. 57. — *Bailey v. Barnes*, 1894, 1 Ch. 25.

In this case, Symonds, a puisne incumbrancer after the bill brought, and after the first decree made, and in truth after the report, gets an assignment of an old judgment and mortgage, hoping thereby to gain a preference to his debt.

PER CURIAM: — The assignment obtained by him being after the decree made, he shall not profit by it, or change the order [526] of payment; but must come in according to the time of his own incumbrance, without regard to the old judgment and mortgage, which he got in after the decree and report.

Bailey v. Barnes.

1894, 1 Ch. 25–37 (s. c. 63 L. J. Ch. 73; 69 L. T. 542; 42 W. R. 66).

[25] *Vendor and Purchaser. — Constructive Notice. — Purchaser of Legal Estate.*

J., the owner of four freehold houses, mortgaged them in fee for £1500 each. The mortgagees transferred their mortgage to B. in consideration of the principal and interest then due, amounting to £1579 1s. 5d. on each house. Two days afterwards B. sold the houses to H. M. for exactly the same sum as he paid for the transfer to himself, and conveyed them to H. M. in exercise of the power of sale in the mortgages, freed from the equity of redemption. H. M. soon afterwards mortgaged the four houses for £6000, and on her death her successor in title, E. M., sold the equity of redemption to L. for £2500, subject to the prior mortgage for £6000. Certain creditors of J., the original owner, who had recovered judgment in an action against him, and obtained equitable execution on his equity of redemption, brought an action against B. and E. M., impeaching the validity of the sale to H. M., and obtained judgment setting it aside as a fraudulent execution of the power of sale, and declaring the plaintiffs entitled to a right of redemption. L. was not a party to the action, but on receiving notice of it he paid off the mortgage for £6000, and took a conveyance of the legal estate from the mortgagees. At the time when L. purchased the equity of redemption from E. M., he had no actual notice of any impropriety in the sale by B. to H. M., nor of any facts affecting the sale not disclosed by the deeds, except that he had seen a valuation which appeared to show that the purchase by H. M. was at an undervalue, nor did he make any inquiries concerning the circumstances of the sale: —

Held (affirming the decision of STIRLING, J.), that L. was not affected by constructive notice of the impropriety of the sale, and that he was protected against the prior equitable interest of the plaintiffs by his acquisition of the legal estate.

By four deeds dated respectively the 12th of May, 1888, four houses, being Nos. 11, 12, 13, and 14, Salisbury Pavement, Putney, were conveyed to Charles Johnson in fee.

By three deeds, dated respectively the 14th of May, 1888,

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Johnson conveyed the houses, Nos. 12, 13, and 14, to L. S. Bristowe and C. Robbins in fee, by way of mortgage for securing on each house £1500 and interest, and by a deed dated the 14th of June, 1888, Johnson conveyed No. 11 to C. H. Foss, *J. R. [* 26] Sowray, and C. Robbins in fee, by way of mortgage for securing a like sum of £1500 and interest.

On the 28th of January, 1889, the plaintiffs, F. Bailey, D. Bailey, and W. S. Marner, recovered judgment against Johnson in an action for a debt and costs, amounting together to £1314 15s. 3d., and on the 16th of March following, they obtained an order for a receiver, by way of equitable execution on his equity of redemption in the four houses.

The plaintiffs did not register their order for a receiver under the Land Charges Registration and Searches Act, 1888, until the 17th of February, 1890, but they gave notice on the 20th of March, 1889, to the mortgagees and to the occupying tenants of the house. Shortly afterwards the mortgagees entered into possession of the premises by taking the rents and profits.

On the 21st of December, 1889, the mortgagees transferred their mortgages to James Barnes, the consideration in the case of each house being £1579 1s. 5d., namely, £1500 for principal and £79 1s. 5d. for interest. On the 23rd of December, 1889, Barnes conveyed the houses to Hannah Midgley for the exact sum which he had himself paid to the mortgagees, viz. £1579 1s. 5d. for each house. Barnes purported to convey under the powers of sale contained in the original mortgages.

On the face of the documents there was nothing, except the fact that Hannah Midgley paid Barnes the same sum that he paid the mortgagees, to show that anything was wrong or irregular in this transfer and sale, but Barnes was in fact a mere nominee of Hannah Midgley, and there was no real exercise of the power of sale.

On the 4th of March, 1890, Hannah Midgley mortgaged the houses for £6000, and the mortgagees had the legal estate conveyed to them in the usual way.

On the 6th of March, 1890, Hannah Midgley made a second mortgage to Wigley for £500.

Hannah Midgley died on the 13th of May, 1890, having by her will given all her real and personal estate to Edwin Midgley, whom she appointed her sole executor.

On the 29th of July, 1890, Mr. A. P. Lilley agreed to buy the

property from Edwin Midgley for £2,500, subject to the [* 27] prior* mortgage for £6000. On the 13th of August a conveyance was executed by E. Midgley to Lilley, and he paid the £2500 purchase-money.

In July, 1890, Lilley had been shown a valuation made by a firm of auctioneers in January, 1890, for the purposes of the mortgage by Hannah Midgley, and according to this valuation the value of the property was somewhat speculative, but was estimated at £8700. An abstract was delivered to Lilley's solicitors, Messrs. Lee & Pemberton, disclosing the deeds of the 12th of May, 1888, the 14th of May, 1888, the 14th of June, 1888, the 21st of December, 1889, the 23rd of December, 1889, and the 4th of March, 1890. The title was investigated by the solicitors on his behalf, and they made several requisitions, but none were made in respect of the transaction carried into effect by the deeds of December, 1889. They also made the usual searches in the land registry, but found nothing registered against E. Midgley from the time when he acquired the property.

As early as March, 1890, the plaintiffs suspected that the sale to Hannah Midgley was not a *bonâ fide* sale. Her estate was being administered by the Court, and an order was obtained by the plaintiffs on the 11th of August, 1890, for leave to take proceedings to impeach the sale. On the 15th of August, 1890, a writ was accordingly issued against Barnes, Johnson, and E. Midgley to set aside the sale by Barnes to Hannah Midgley, and to redeem the property on the footing that E. Midgley was only entitled to be treated as a mortgagee. Lilley, of whom the plaintiffs knew nothing, was not a party to these proceedings. In June, 1891, however, Lilley heard that the sale by Barnes to Midgley was questioned. On the 17th of March, 1892, Mr. Justice Stirling declared that the sale was invalid, and the plaintiffs were entitled to redeem the property, and on the 5th of November, 1892, the decision was affirmed on appeal.

On the 7th of February, 1893, a receiver of the four houses was appointed in the action. In March, 1893, Lilley moved to discharge this order; and before the motion was heard, in order to secure his title, he paid off the mortgage for £6000, and on the 11th of April, 1893, took a conveyance of the legal estate from the mortgagees.

[* 28] *When the motion was brought on it was arranged that

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it should be treated as an application by Lilley to appear and be examined *pro interesse suo*, and it was subsequently agreed that the witnesses should be cross-examined before the Court, and that the learned Judge should determine all questions as to the rights of Lilley and the plaintiffs, in like manner as if an action had been brought for the purpose.

Lilley was accordingly examined and cross-examined. The result of the evidence was that he had no knowledge of any circumstances affecting Hannah Midgley's title beyond what appeared on the face of the deeds set out in the abstract, and the valuation of January, 1890.

The motion was heard before Mr. Justice STIRLING on the 19th and 20th of April, 1893.

Warrington, for Lilley: —

Mr. Lilley is entitled to hold the property free from the plaintiffs' equitable charge. He was a *bonâ fide* purchaser without any notice either actual or constructive of any defect in the title, or of any impropriety or irregularity in the exercise of the power of sale at the time when he made his purchase. He has acquired the legal estate from the mortgagees, and is entitled to rely on the protection afforded by sect. 21, sub-sect. 2 of the Conveyancing Act, 1881, and sect. 3, sub-sect. 1 of the Conveyancing Act, 1882. *Rice v. Rice*, 2 Drew. 73.

The knowledge that the sale was made at an undervalue (which is the utmost degree of knowledge that can be imputed to Lilley) is not enough to render it an improper exercise of the power of sale so as to give him constructive notice of the invalidity of the sale, although as between mortgagor and mortgagee, the mortgagor or second mortgagee might be entitled to relief.

Fischer, Q. C., and Archibald Brown, for the plaintiffs: —

There was quite enough to affect Lilley with constructive notice of an improper or irregular exercise by Barnes of the power of sale, and the plaintiffs are entitled to priority by virtue of their earlier equitable charge. *Phillips v. Phillips*, 4 D. F. & J. 208, 213; *Ind, *Coope & Co. v. Emmerson*, 12 App. Cas. 300, [*29] 306; *Jackson v. Rowe*, 2 S. & S. 472; *Farrar v. Farrars, Limited*, 40 Ch. D. 395, 410; *Marfield v. Burton*, L. R. 17 Eq. 15; *Parkinson v. Hanbury*, 1 Dr. & Sm. 143; *Selwyn v. Garfit*, 38 Ch. D. 273. At all events, Lilley ought to have acquired notice of the *mala fides* of the sale. He was put upon inquiry, and his not

having made inquiry was an act of culpable negligence. He only got in the legal estate quite recently — since the commencement of this action — and he is not entitled to the benefit of the provisions contained in the sections of the Conveyancing Acts of 1881 or 1882 which have been referred to. *Bellamy v. Sabine*, 1 De G. & J. 566; *Van Gelder v. Sowerby Bridge United District Flour Society*, 44 Ch. D. 374; *Campbell v. Holyland*, 7 Ch. D. 166; rules of Supreme Court, 1883, Order XVI., rule 11.

Midgley was served with notice of motion, but did not appear.

Warrington, in reply : —

A legal estate acquired *pendente lite* is sufficient. The decision in *Robinson v. Davison*, 1 Bro. C. C. 63, shows that if a third mortgagee buys in the first mortgage *pendente lite* the second mortgagee is excluded. That decision has never been dissented from, and it was cited with approbation in *In re Russell Road Purchase-Moneys*, L. R. 12 Eq. 78, 85. Moreover, Order XXIV., rule 1, provides that any ground of defence arising after action brought may be raised in defence or in reply. If there was an improper or irregular exercise of the power of sale Mr. Lilley's title is not affected by it unless he had personal knowledge of it. *Selwyn v. Garfit*. It would be unreasonable to require every purchaser to inquire into the adequacy of the price paid for the property by the vendor. This was an embryo property of a speculative character, and the nominal rents had not been actually paid by the tenants. The purchaser was entitled to assume that the sale was made after due notice given to the mortgagor requiring payment of the mortgage money.

[*30] *1893. May 16. STIRLING, J. : —

It has been agreed that I should determine all questions as to the rights of the applicant and the plaintiffs in like manner as if an action had been brought. The order now to be made will consequently contain a submission by both parties to be bound in like manner as if the order were made in an action brought by the plaintiffs against the applicant. The history of the action is shortly as follows [His Lordship then stated the facts of the case, and continued : —]

Mr. Lilley has quite recently, namely, on the 11th of April, 1893, taken steps for obtaining a transfer to himself of the mortgage of the 4th of March, 1890, and has got in the legal estate. Under these circumstances Mr. Lilley relies on the provisions

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of sect. 21, sub-sect. 2, of the Conveyancing Act, 1881, which are as follows: "Where a conveyance is made in professed exercise of the power of sale conferred by this Act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised: but any person damnified by an unauthorised, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power." I think that Mr. Lilley is entitled to the benefit of these provisions unless it can be made out that he had notice that the powers of sale contained in the mortgages of 1888 were improperly or irregularly exercised by Barnes. If he had such notice, then, in my opinion, the decisions on similar provisions actually introduced into mortgage deeds (as, for example, *Parkinson v. Hanbury*, 1 Dr. & Sm. 143, and *Schwartz v. Garfit*, 38 Ch. D. 273) ought to be applied. I think that to uphold the title of a purchaser who had notice of impropriety or irregularity in the exercise of the power of sale would be to convert the provisions of the statute into an instrument of fraud.

Now, Mr. Lilley had no actual knowledge of any impropriety or irregularity. Neither, in my opinion, did he wilfully shut his eyes and abstain from making inquiries which might have led to a knowledge of impropriety or irregularity. Sect. 3 of the *Conveyancing Act of 1882 provides as follows: "A pur- [*31] chaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless — (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him;" and it is contended that he ought, having regard to the facts disclosed by the abstract, and to the valuation which was produced to him, to have made further inquiries.

I take it that to render the second branch of this section applicable, the circumstances must be such as to bring the case within what is laid down by Lord CRANWORTH in *Ware v. Lord Egmout*, 4 D. M. & G. 460, 473: "I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of equity to extend this doctrine — to attempt to apply it to cases to which it has not hitherto been held

applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him — that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down."

The state of the title to which I have to apply the law is shortly this: Sale of the houses to Johnson in May, 1888, followed by mortgage of each house for £1500, the advance in one case

being sanctioned by the Court, the inference being that the [* 32] value must have been about £2200. In December, * 1889,

there is a transfer of the mortgages, followed immediately by a sale for the amount of the mortgage debt, namely, £6300, about, and the purchaser knew of a valuation, dated in January, 1890, showing that the property was worth £8700.

It was quite possible that the transferee of the mortgage might have been in a position to exercise the power of sale at the time of the transfer. The events mentioned in sect. 20 of the Conveyancing Act, 1881, might have occurred prior to the transfer, and, but for the amount of the price, I cannot think that the sale could reasonably be supposed to be affected by any impropriety. As regards the price, a mortgagee "is bound to sell fairly, and to take reasonable steps to obtain a proper price; but he may proceed to a forced sale for the purpose of paying the mortgage debt." See *Farrar v. Farrars, Limited*, 40 Ch. D. 398.

The question, therefore, appears to me to reduce itself to this, whether the not obtaining further information as to the circumstances under which the sale took place amounted to culpable negligence; and, in my opinion, it did not. I think that Mr. Lilley or his advisers might reasonably have abstained from in-

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quiring into that subject; and, therefore, that Mr. Lilley is entitled to rely on the apparent title created by the conveyances of the 23rd of December, 1889, and to hold the property to which he has now acquired a legal title, free from redemption by the plaintiffs. There will be a declaration accordingly; but it is not a case for costs on either side.

From this decision the plaintiffs appealed. The appeal came on to be heard on the 1st of August, 1893.

Fischer, Q. C., and Archibald Brown for the appellants:—

Lilley claims to be a purchaser for value without notice. Our reply is twofold: first, that he bought nothing but an equity of redemption, and, therefore, notice or no notice, he took subject to all prior equities; secondly, he neither acquired the legal estate nor paid the £6000 until after he had notice of our charge. He could not better his position after he had given his notice of motion, and so the litigation with him had commenced.

* [LINDLEY, L. J.:—Does the doctrine of *lis pendens* [*33] apply to a mere motion to discharge a receiver?]

The submissions in the order put the proceedings on the same footing as an action. The Court disregards what is done *pendente lite*. *Bellamy v. Sabine*, 1 De G. & J. 566.

[Cozens-Hardy, Q. C., referred to *Robinson v. Davison*, 1 Bro. C. C. 63.]

Every purchaser for value of an equitable interest, if he seeks protection by getting in the legal estate, must show that he paid his money and took the legal estate, without notice. *Peacock v. Burt*, 4 L. J. (N. S.) Ch. 33; *Pearson v. Benson*, 28 Beav. 598; *Toulmin v. Steere*, 3 Mer. 210.

[LINDLEY, L. J.:—We only wish to hear the counsel for the respondents upon the question of notice.]

Cozens-Hardy, Q. C., and Warrington, for the respondent Lilley:—

The contract was an ordinary contract, and the power of sale had arisen; there was no reason why the purchaser should look beyond this. The doctrine of constructive notice ought not to be carried too far. A purchaser is not bound to be suspicious, but only to take the ordinary precautions which men of business use. *Ware v. Lord Egmont*, 4 D. M. & G. 460; *Montefiore v. Brown*, 7 H. L. C. 241. Under these circumstances we rely upon the Conveyancing Act, 1881, s. 21, sub-s. 2, and the Conveyancing Act, 1882, s. 3, sub-s. 1.

Ashton Cross, for the defendant Midgley.

Fischer, in reply.

1893. Oct. 30. The judgment of the Court (LINDLEY, LOPES, and A. L. SMITH, L. JJ.), was delivered by

LINDLEY, L. J. (after stating the facts as set forth above, proceeded as follows):—

The grounds of Mr. Justice STIRLING's decision were, (1) that when Lilley agreed to buy the property in July, 1890, and [*34] when * he paid the £2500 to his vendor, he, Lilley, acted perfectly *bonâ fide* and without any actual notice of the invalidity of the sale by Barnes to H. Midgley; (2) that Lilley had no constructive notice of such invalidity at those times; (3) that although he had notice of such invalidity in June, 1891, he was entitled to protect himself by acquiring the legal estate, which he ultimately did; and (4) that under these circumstances he was protected by sect. 21, sub-sect. 2, of the Conveyancing Act, 1881, and sect. 3 of the Conveyancing Act, 1882.

Bonâ fides on the part of Mr. Lilley and the absence of actual notice by him of anything wrong were found as facts by the learned Judge before whom Mr. Lilley was examined, and we accept his conclusions on these points.

The appeal then really turns on whether in July and August, 1890, Mr. Lilley is to be treated as having had notice of the invalidity of Midgley's title, and on the effect of acquiring the legal estate in April, 1893. This is one of those cases in which there is danger of referring knowledge of facts now known to a time anterior to their discovery — danger of falling into the error attributed to those who are wise after the event. The plaintiff's case against Lilley rests on the notice, if any, which he had in August, 1890, when he bought the property and paid the £2500. No doubt if he had been a suspicious or unwilling purchaser, he would very likely have made inquiries which would have induced him not to complete his purchase. But he was not suspicious in fact, and he did not make such inquiries as a suspicious man would perhaps have made. It would, however, be going too far to affect him with constructive notice of the invalidity of Barnes' sale. The doctrine of constructive notice is based on good sense, and is designed to prevent frauds on owners of property; but the doctrine must not be carried to such an extent as to defeat honest purchasers; and although this limitation has sometimes been lost sight of, still the limitation is as important and is as well known

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as the doctrine itself. This will be seen both from well-known decisions and from the language of the Conveyancing Act, 1882, s. 3, which is now the authority to be regarded. In *Ware v. Lord Eymont*, 4 D. M. & G. 460, Lord CRANWORTH stated the law on this subject * in language which has always been accepted [*35] as correct. [His Lordship read the passage from p. 473 of the report, which was read by Mr. Justice STIRLING in his judgment, *ante*, p. 515.]

“Gross or culpable negligence” in this passage does not import any breach of a legal duty, for a purchaser of property is under no legal obligation to investigate his vendor’s title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor’s title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. In the celebrated judgment of Vice-Chancellor WIGRAM in *Jones v. Smith*, 1 Hare, 43, the cases of constructive notice are reduced to two classes: the first comprises cases in which a purchaser has actual notice of some defect, inquiry into which would disclose others; and the second comprises cases in which a purchaser has purposely abstained from making inquiries for fear he should discover something wrong. The Conveyancing Act, 1882, really does no more than state the law as it was before, but its negative form shows that a restriction rather than an extension of the doctrine of notice was intended by the Legislature. The 3rd section runs thus (sub-sect. 1): “A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless — (i.) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him.” Can we say that Mr. Lilley or his solicitors “ought reasonably” to have made inquiries into the validity of the sale by Barnes? “Ought” here does not import a duty or obligation; for a purchaser need make no inquiry. The expression “ought reasonably” must mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances. Light is thrown on the meaning of “ought reasonably” by the Conveyancing Act, 1881, s. 21, sub-s. 2, which relieves purchasers from mortgagees purporting to sell under powers of sale

from the necessity of inquiring into the propriety or irregularity of the exercise of the * power. It is easy to see now that Mr. Lilley's solicitors might have been more suspicious and more cautious; but we are not prepared to say that they ought to have been so when he bought in August, 1890, and unless we can go that length we cannot hold that Mr. Lilley then had notice of anything wrong.

For these reasons we have come to the conclusion that, in August, 1890, when Mr. Lilley bought the property subject to the mortgage for £6000, he had no notice, actual or constructive, of any defect in his vendor's title.

The case, then, stands thus: The plaintiffs had a judgment affecting Johnson's equity of redemption. Lilley had acquired by purchase for value an equitable interest in the same property from a person whose title apparently displaced Johnson's and also, consequently, the plaintiffs' judgment. Lilley had no notice of any defect in his own title, no notice that the plaintiffs' judgment affected him. Lilley afterwards discovers that the plaintiffs' judgment is not displaced, and in order to protect himself he pays off the £6000 mortgage and gets in the legal estate. The question is whether he can now hold the property free from the plaintiffs' judgment.

We are of opinion that he can. The maxim *Qui prior est tempore potior est jure* is in the plaintiffs' favour, and it seems strange that they should, without any default of their own, lose a security which they once possessed. But the above maxim is, in our law, subject to an important qualification, that, where equities are equal, the legal title prevails. Equality, here, does not mean or refer to priority in point of time, as is shown by the cases on tacking. Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other. Equitable owners who are upon an equality in this respect may struggle for the legal estate, and he who obtains it, having both law and equity on his side, is in a better situation than he who has equity only. The reasoning is technical and not satisfactory; but, as long ago as 1728, the law was judicially declared to be well settled and only alterable by Act of Parliament. See *Bruce v. Duchess of Marlborough*, 2 P. Wms. 491.

[* 37] * It was contended that this doctrine was confined to

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tacking mortgages. But this is not so. The doctrine applies in favour of all equitable owners or incumbrancers for value without notice of prior equitable interests, who get in the legal estate from persons who commit no breach of trust in parting with it to them. See *Saunders v. Dehew*, 2 Vern. 271, and *Pilcher v. Rawlins*, L. R. 7 Ch. 259. It is true that the doctrine does not apply to an equitable owner or incumbrancer who gets in the legal estate from a trustee who commits a breach of trust in conveying it to him — at all events, if such breach of trust is known to the person who gets in the estate, and, perhaps, even if he does not know of it. See *Carter v. Carter*, 3 K. & J. 617; *Mumford v. Stohrasser*, L. R. 18 Eq. 556. But the present case does not fall within this exception to or qualification of the general principle: for Lilley obtained the legal estate from a mortgagee whom he paid off, and who committed no breach of trust in conveying the legal estate to him.

The fact that the estate was got in *pendente lite* is immaterial. See *Robinson v. Davison*, 1 Bro. C. C. 63, and *Bates v. Johnson*, Joh. 304.

The appeal must be dismissed with costs.

ENGLISH NOTES.

The general rule above stated and affirmed in *Earl of Bristol v. Hungerford*, is subject to several exceptions, as appears by the following Ruling Cases, and see “Equitable Title,” sect. III. “Priorities,” 10 R. C. 478 *et seq.*

It is, however, strictly applied as between incumbrancers, whose charges are merely equitable, and where there is nothing to give one incumbrancer a better equity than another.

The rule applies where the outstanding legal estate is a fee or a term of years. *Ex parte Knott* (1806), 11 Ves. 609, 8 R. R. 254. Also, where it is a term attendant on the inheritance if not merged by the Satisfied Terms Act, 1845 (8 & 9 Vict., c. 112), *Charlton v. Low* (1734), 3 P. Wms. 330.

The latter branch of the rule, the principle and nature of which are concisely and clearly stated in the judgment of the Court of Appeal in *Bailey v. Barnes*, has long been established. It is stated in the words above used in Fonblanque’s Treatise on Equity, 5th ed. Vol. II. p. 302. See also Bac. Abr. “Mortgage,” E. 3: and it is attributed by Lord HARDWICKE, L. C., to the separate jurisdictions of law and equity in his time, but for which the rule *qui prior est tempore potior est jure* must hold. *Wortley v. Bickhead* (1754), 2 Ves. Sen. 571, 574, 3 Atk. 809. The Judicature Acts, however, have made no alteration in the law in this respect.

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A mortgagee who originally obtains, or afterwards acquires, the legal estate, prevails over all other mortgages, charges, and incumbrances of which he had no notice at the time when he advanced his money. *Goodtitle v. Morgan* (1787), 1 T. R. 755; *Right v. Bucknell* (1831), 2 B. & Ad. 278, 36 R. R. 563; *Bates v. Brothers* (1855), 2 Sm. & G. 508; *Bailey v. Barnes, supra*. The Court is not scrupulous by what means a *bonâ fide* mortgagee without notice at the time of advancing his money, obtains a legal protection for his security, even though it be by getting in a judgment or a satisfied term. *Edmonds v. Porcy* (1683), 1 Vern. 187; *Willoughby v. Willoughby* (1787), 1 T. R. 763, 1 R. R. 397. So also the acquisition of a nominal legal reversion in a term of years was held to prevail over an equitable charge on the freehold. *Re Russell Road Purchase Moneys* (1876), L. R. 12 Eq. 78, 40 L. J. Ch. 673, 23 L. T. 839, 19 W. R. 706. This decision was appealed from but compromised.

An immediate legal estate will be preferred to a legal estate in reversion. *Ex parte Knott* (1806), 11 Ves. 609, 8 R. R. 254; *Hurst v. Hurst* (1853), 16 Beav. 672.

Getting in the legal estate in part of the security will not protect the incumbrance so far as regards the remainder of the property. *Marsh v. Lee* (1670), No. 58, p. 523, *post*.

If the mortgagee have no notice at the time of advancing his money he may protect his security by getting in the legal estate at any time, even though at the time when he gets in the legal estate, he had notice of a mesne incumbrance. *Willoughby v. Willoughby, supra*; *Blackwood v. London Chartered Bank of Australia* (P. C. 1874), L. R. 5 P. C. 92, 113, 43 L. J. P. C. 25, 30 L. T. 45, 22 W. R. 419; *Taylor v. Russell*, No. 9, "Equitable Title," 10 R. C. 545. See further on this point "Purchaser for Value without Notice," *post*.

A mortgagee who has not acquired the legal estate may, nevertheless, so long as it is outstanding, have priority over other incumbrancers if he has the best right to call for a conveyance of the legal estate. *Earl of Pomfret v. Lord Windsor* (1752), 2 Ves. Sen. 472; *Stanhope v. Earl Verney* (1765), 2 Eden, 81; *Ex parte Knott, supra*; *Allen v. Knight* (1846) 5 Hare, 272; *Cooke v. Wilton* (1860), 29 Beav. 100.

So an equitable mortgage by deposit of deeds by the purchaser of an estate, the purchase-money of which was unpaid, was held to prevail over the vendor's lien. *Rice v. Rice* (1853), 2 Drew. 73, 10 R. C. 507.

AMERICAN NOTES.

This matter has been considerably and probably sufficiently examined, *ante*, vol. 10, p. 569. See notes, 97 Am. Dec. 433-435, where the cases support-

No. 58. — *Marsh v. Lee*, 2 Ventr. 337. — Rule.

ing both branches of the rule are cited. 2 Pomeroy's Eq. Jur. sects. 413, 678, 718.

In *Chamberlain v. Thompson*, 10 Connecticut, 243; 26 Am. Dec. 390, the Court said: "There is no more familiar principle than that the plaintiffs are bound to show an equity superior to that of the defendant, before they can successfully claim the interposition of a Court of chancery. If their equity be inferior, or equal only to his, a Court of equity will leave the parties where it finds them; and the legal title must prevail." To this effect, *Jones v. Zollicoffer*, North Carolina Term Rep. 212; 7 Am. Dec. 709. See *Berry v. Mut. Ins. Co.*, 2 Johnson Ch. (N. Y.), 603.

But under our registry system this doctrine loses most of its applicability. See notes, 97 Am. Dec. 435. But the rule of priority of time among equal equities applies "wherever its operation has not been interfered with or modified by the Recording Acts." 2 Pomeroy Eq. Jur. sect. 718; *Fitzsimmons v. Ogden*, 7 Cranch (U. S. Sup. Ct.), 18; *Vanmeter v. McFaddin*, 8 B. Monroe (Ky.), 435; *Rowan v. State Bank*, 45 Vermont, 160; *Tharpe v. Dunlap*, 4 Heiskell (Tenn.), 674.

As to the second branch of the rule, see Pomeroy, sects. 416, 417, entitled, "Where there is equal equity, the law must prevail." Citing *Rice v. Rice*, 2 Drew. 73; *Phillips v. Phillips*, 4 DeG., F. & J. 208.

No. 58. — MARSH v. LEE.

(1670.)

RULE.

THE possession or acquisition of the legal estate by a mortgagee entitles him to priority in respect of a separate equitable charge in his favour upon the same property, so as to postpone the securities of intermediate incumbrancers.

Marsh v. Lee.

2 Ventr. 337-339.

Mortgage without Notice of Prior Mortgage. — Subsequent Purchase of Legal Title.

A bill in Chancery was brought by Marsh, and an answer [337] put in thereto.

The case was thus: —

One English being seised of the Manor of Wickfall, and of the Manor of Monfield, in 1649, mortgages part of the Manor of Wickfall to Burrell for £1000. Afterwards in 1655, he acknowledges a statute to Burrell of £800 for the payment of £400.

Afterwards in 1662, English mortgages both these Manors to Mrs. Duppa for £7000. Afterwards in 1665, English mortgages the Manor of Wickfall to Lee for £2000, Lee having no notice of the former mortgages. But afterwards, Lee, coming to have notice of the mortgage to Duppa, purchases in the two incumbrances to Burrell, (viz.) the mortgage of part of the Manor of Wickfall, and the statute. And now Marsh, executor of Duppa, sues Lee, who pleads this whole matter.

[* 338] * My LORD KEEPER, assisted with HALE, Chief Baron, and Justice RAINSFORD, held, that Lee might make use of these incumbrances to protect his own mortgage. For they said, that he had both law and equity for him.

First, he had law; for that he had a precedent mortgage in 1649 (which indeed was but upon part), and also the statute in 1655, so that while these remained in force, Marsh could not come in.

Next he had equity; for he, having a subsequent mortgage, yet, it being without notice, he ought to be relieved in this Court. And therefore my LORD CHIEF BARON put the case, as if the first mortgage had been of the Manor of W. to Burrell, and afterwards it had been mortgaged to Duppa, and afterwards to Lee, not having notice; if afterwards Lee bought in Burrell's mortgage, he shall hold the estate against Duppa, until he be satisfied for both the money which he paid Burrell and also his own money lent upon the last mortgage: And for that he said, that it had been so adjudged in *Camera Scaccarii*, in the Court of Equity, since the King came in, in one *Shelley's Case*; next he put the case of the statute which English entered in to Burrell in 1655, and was afterwards bought by Lee from Burrell. He held that Duppa shall not bring Lee to any account upon this statute here in equity, any otherwise than he may do at common law.

Nota, It was agreed that the lands were extended upon the statute at the third part of the true value. Now at common law the conusor, or he that claims under him, must bring a *Scire facias ad computand*, as in the 4 Co. 69 b. But then the conusee shall not account according to the true value, but according to the extended value, and also for the whole statute: and if the conusee is satisfied by the extended value, the conusor shall recover; or if the conusor will pay down the rest of the money which is behind with damages, he shall also recover. But if the conusor will sue the

No. 58. — *Marsh v. Lee*, 2 Vent. 338, 339.

conusee in a Court of equity, then he shall bring him to account for what he hath received of the profits above the extended value.

Now then, our case here is somewhat more: for Lee has also equity on his side, and therefore Duppa shall not bring him to account for what he has received above the extended value, unless he has also received enough to satisfy his own mortgage of £2000 as well as the statute; and therefore if Marsh will take off this statute by a suit in this Court, he must be content that Lee doth account upon the extended value for the whole £800 and damages.

* Secondly, they held, that whereas part of the Manor [* 339] of W. was mortgaged to Burrell, but that now the whole Manor was mortgaged to Lee, that yet the first mortgage should not extend to protect more than that part of the Manor which was first mortgaged to Burrell.

And my Lord Chief Baron HALE put the case thus: If a man is seised of 60 acres, and mortgages 20 to A. and then mortgages the whole to B. and then mortgages the whole to C. and afterwards C. purchases in the first mortgage, that shall not protect more than the 20 acres; but it shall protect those 20 acres so as B. shall never recover that until he pay C. all the money upon the first and last mortgage.

But HALE said. that he thought that in this case, inasmuch as the mortgage to Lee was only of part of W. that therefore Marsh might bring Lee to an account upon the extended value, whereupon these two Manors were extended upon the statute; and if Lee had received the money due upon the statute by receiving of the profits according to the extended value, or if she will pay down the residue of the money due upon the statute, or if she will pay down so much as the proportion will come to for Monfield, that then she may discharge the Manor of Monfield.

But then my LORD KEEPER asked him, how he would have it appointed, and how much should be laid upon Monfield, and how much upon Wickfall; for that part of W. is under that extent.

To which HALE answered, that if Marsh did sue Lee for the discharge of this statute from Monfield, that Monfield should be discharged by her paying down as much as the proportion comes to; or when Lee shall have received so much according to the extended value; and that he thought there might be a proportion found out by the Court.

Nota, Sir H. Fynch, counsel for Lee, cited *Primate and Jackson's Case*, *Grove and Grove's Case*, and *Mrs. Calamy's Case*, 1 Ch. Cas. 36; all which were resolved in this Court, that a purchaser or mortgagee coming in upon a valuable consideration without notice, and purchasing in a precedent incumbrance, it shall protect his estate against any person that hath a mortgage subsequent to the first, though before the last mortgage; though he purchased in the incumbrance after he had notice of the second mortgage.

ENGLISH NOTES.

This doctrine, commonly known as the doctrine of tacking, is founded upon the maxim "where equities are equal the law shall prevail," and forms an exception to the general rule of equity that equitable incumbrancers as between themselves rank in priority of time. The doctrine has been long and firmly established and has not been altered by the Judicature Acts.

This doctrine applies to all property, real or personal. See as to personal estate: *Calisher v. Forbes* (1871), L. R. 7 Ch. 109, 41 L. J. Ch. 56, 25 L. T. 772, 20 W. R. 853, where under the circumstances of the case, an equitable incumbrancer of a fund was allowed to take a further advance as against mesne incumbrancers.

The application of the doctrine of tacking to personalty is to a great extent excluded by the rules as to priority by notice in the case of mortgages of choses in action and equitable interests in funds: see "Equitable Assignment," 10 R. C. 411, *et seq.*: and by statutory regulations as to priority by registration in the cases of mortgages of chattels, and ships. See "Bill of Sale," 5 R. C. 38; and "Ships," *post*.

Protection by tacking was abolished by the Vendor and Purchaser Act, 1874 (37 & 38 Vict., c. 78), s. 7, but this enactment was repealed as to England by the Land Transfer Act, 1875 (38 & 39 Vict., c. 87), and as to Ireland by the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), s. 73; except as to anything duly done under the Act of 1874, before the commencement of the repealing Acts.

Tacking is not applicable to registered charges under the Land Transfer Act, 1875, as such charges (subject to any entry to the contrary on the register), rank as between themselves according to priority of registration. See sect. 28 of that Act.

By the Yorkshire Registries Act, 1884 (47 & 48 Vict., c. 54), s. 16, it is provided that, as regards lands and hereditaments within the three ridings of the county of York, and the town of Kingston-on-Hull, no priority or protection by legal estate or tacking is given or allowed after the commencement of the Act, except as against any estate or interest

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existing prior to such commencement, although the person claiming such protection is a purchaser for value without notice.

Registration in Middlesex is not notice, and the general rules as to tacking apply to mortgages of lands in that county. *Bedford v. Backhouse*, 2 Eq. Cas. Abr. 615; *Arden v. Arden* (1885), 29 Ch. D. 702, 54 L. J. Ch. 655, 52 L. T. 610, 33 W. R. 593.

The doctrine of tacking is virtually excluded in Ireland by the Irish Registry Act (6 Ann. c. 2), whereby the priority of incumbrances *inter se* is regulated according to time at which the memorials thereof were respectively registered. *Lord Dunsany v. Latouche* (1804), 1 Sch. & Lef. 137, at pp. 157 to 160.

The doctrine of tacking was very fully discussed in the case of *Brace v. Duchess of Marlborough* (1728), 2 P. Wms. 490, in which a series of rules on this subject were laid down.

The first general rule laid down in *Brace v. Duchess of Marlborough*, is "that if a third mortgagee buy in a first mortgage, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgagee having obtained the first mortgage, and having the law on his side and equal equity, he shall thereby squeeze out the second mortgagee."

This rule is the same as that laid down in *Marsh v. Lee*, *supra*, and adopted in numerous subsequent cases.

Although *lis pendens* will not prevent a third mortgagee from getting in a prior legal mortgage so as to protect his equitable security, yet tacking will not be allowed after a decree to settle priorities. *Earl of Bristol v. Hungerford*, No. 56, p. 508, *ante*; *Wortley v. Birkhead* (1754), 2 Ves. Sen. 574; *Ex parte Knott* (1806), 11 Ves. 609, 8 R. R. 254.

In order to entitle a lender to tack his advance to a legal mortgage transferred to him so as to oust mesne incumbrancers, the advance must have been made upon the security of the land. *Ex parte Knott*, *supra*; *Lacey v. Ingle* (1847), 2 Ph. 413.

A mortgagee will not be allowed to protect his security by getting in the legal estate, as against mesne incumbrancers of whose charge he had notice at the time when he lent his money; and if his right to tack is challenged he must expressly deny notice, whether alleged in the action or not. *Cason v. Round*, Pre. Ch. 226, and see note to *Jones v. Thomas* (1733), 3 P. Wms. 243.

Also a mortgagee cannot protect himself by getting the legal estate from a person who, to the knowledge, actual or constructive, of the mortgagee is a trustee for another person, so that the transfer of the legal estate would be a breach of trust. *Allen v. Knight* (1846), 5 Hare, 272. See *Marfield v. Burton* (1873), L. R. 17 Eq. 15, 43 L. J. Ch. 46, 29 L. T. 571, 22 W. R. 148. But a mortgagee may avail himself

of the legal estate got in without notice of any trust affecting it from a trustee who conveys it in breach of trust. *Pilcher v. Rawlins* (1872), L. R. 7 Ch. 259, 41 L. J. Ch. 485, 25 L. T. 921, 20 W. R. 281. See *Young v. Young* (1867), L. R. 3 Eq. 801.

The second rule laid down in *Bruce v. Duchess of Marlborough* is, "that if a judgment creditor, or creditor by statute or recognisance, buys in the first mortgage, he shall not tack or unite this to his judgment, &c., and thereby gain a preference; for such a creditor cannot be called a purchaser, nor has he any right to the land; he has neither *jus in re*, or *jus ad rem*. All that he has by his judgment is a lien on the land, but *non constant* whether he will ever make use of it, for he may take his debt out of the goods of his debtor by *feri facias*, or may take his body, after which, during the defendant's life he can have no other execution; besides which, the judgment creditor does not lend his money on the immediate view or contemplation of the land, nor is he deceived or defrauded though his debtor had before made twenty mortgages of his estate; but a mortgagee is defrauded or deceived if the mortgagor has already mortgaged his land to another."

In *Ex parte Knott*, *supra*, Lord ELDON explained that a mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land; he has neither *jus in re*, nor *jus ad rem*: he is therefore entitled only as a judgment creditor to an *elegit*, and cannot tack. The law in this respect is not altered by the Statute 1 & 2 Vict., c. 110. *Whitworth v. Gaugain* (1844), 3 Hare, 416; *Benham v. Keane* (1861), 3 De G. F. & J. 318. No right to tack a judgment to a legal mortgage can now possibly arise until the land has been actually delivered in execution. See 27 & 28 Vict., c. 112.

The third rule in *Bruce v. Duchess of Marlborough* is that if a first mortgagee lends a further sum to the mortgagor upon a statute or judgment, he shall retain against a mesne mortgagee until both his securities are satisfied.

The reason for the rule, as given by Sir J. JEKYLL M. R., in this case is that "it is to be presumed that the mortgagee lent his money on the statute or judgment as knowing that he had hold of the land by the mortgage, and in confidence lent the further sum on a security which, though it passed no present interest in the land, yet must be admitted to be a lien thereon." The rule results from the maxim previously referred to, that where equities are equal the law shall prevail.

The further advance cannot be tacked to the first mortgage unless such advance is made on the security of a subsequent mortgage or charge on the land, or by a judgment duly perfected by execution so as to affect the land. *Morritt v. Paske* (1740), 2 Atk. 52; *Godfrey v. Tucker* (1863), 33 Beav. 280.

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The security for the further advance must be in writing. A legal mortgagee will not be allowed to tack a further charge to the prejudice of mesne incumbrancers merely because the deeds are already in his possession, unless he takes a memorandum of further charge. *Ex parte Hooper* (1815), 1 Mer. 7.

A first mortgagee will not be allowed to tack a further advance unless he has the legal estate, or at all events the best right to call for it. *Cooke v. Wilton* (1860), 29 Beav. 100. See *Wilmot v. Pike* (1845), 5 Hare, 14; *Robinson v. Trevor* (1883), 12 Q. B. D. 423, 53 L. J. Q. B. 85, 50 L. T. 190, 32 W. R. 394; *Fourth City Mutual Benefit Building Society v. Williams* (1879), 14 Ch. D. 146, 49 L. J. Ch. 245, 42 L. T. 615, 28 W. R. 572.

A legal mortgagee cannot claim priority over a subsequent mortgagee in respect of any further advance made by him as first mortgagee, subsequent to notice of the later mortgage. *Hopkinson v. Rolt* (H. L. 1862), 9 H. L. Cas. 514; *London & County Bank v. Ratliff* (H. L. 1881), 6 App. Cas. 722, 51 L. J. Ch. 28, 45 L. T. 322, 30 W. R. 109; *Union Bank of Scotland v. National Bank of Scotland* (1886), 12 App. Cas. 53, 56 L. T. 208.

So, a legal mortgagee of land cannot tack a further advance made to a subsequent equitable incumbrance got in by him *pendente lite* after registration of the *lis pendens*, as such registration would affect him with notice. *Morritt v. Paske*, *supra*.

Where a mortgagee gets in a subsequent security he will not be allowed to tack such security to his legal mortgage unless he holds both securities in the same right; so he will not be allowed to tack a subsequent security assigned to him as trustee for another person to his own legal mortgage and *vice versâ*. *Morritt v. Paske*, *supra*; *Burnett v. Weston* (1806), 12 Ves. 130; 8 R. R. 319; *Shaw v. Neale* (1858), 6 H. L. C. 581, 27 L. J. Ch. 444.

The last rule in *Brace v. Duchess of Marlborough* is as follows: "It appearing that a puisne incumbrancer had bought in a prior mortgage, in order to unite the same to the puisne incumbrance, but it being proved that there was a mortgage prior to that, the Court clearly held that the puisne incumbrancer, where he had not got the legal estate, or where the legal estate was vested in a trustee, could there make no advantage of his mortgage; but in all cases where the legal estate is standing out, the several incumbrances must be paid according to their priority in point of time: '*Qui prior est in tempore potior est in jure*.'" This rule, that tacking will not be allowed where the legal estate is outstanding, is a corollary to the general rule that the priorities of equitable incumbrances on real estate are regulated by order of date.

AMERICAN NOTES.

Jones (2 Mortgages, sect. 1082), citing this case, observes: "The English doctrine of tacking, whereby a junior mortgagee, by purchasing the first mortgage, was allowed to squeeze out an intermediate mortgage or judgment lien, never gained any general recognition in this country, because at an early day registry laws were adopted, and under these priority of registry gave priority of right. Tacking was only allowed when the last mortgagee took his mortgage without notice of the intervening incumbrance. Under laws therefore making the recording of the deed notice to all who might come after, there was no chance for the application of this doctrine: and this was so declared in several early cases." (*Grant v. U. S. Bank*, 1 Caine Cas. (N. Y.), 112.) "In England, this doctrine, first established through the influence of Sir Matthew Hale, has now been abolished."

Washburn cites the principal case, with observations to the same purport, and cites *McKinstrey v. Merwin*, 3 Johnson Ch. (N. Y.), 466; *Osborn v. Carr*, 12 Connecticut, 195; *Braze v. Lancaster Bank*, 14 Ohio, 318; *Anderson v. Neff*, 11 Sergeant & Rawle (Penn.), 208; *Loring v. Cooke*, 3 Pickering (Mass.), 48; *Averill v. Guthrie*, 8 Dana (Kentucky), 82; *Thompson v. Chandler*, 7 Maine, 377; *Siter v. McClanachan*, 2 Grattan (Virginia), 280, 305. See also *Coombs v. Jordan*, 3 Bland Ch. (Maryland), 284; 22 Am. Dec. 236.

Pomeroy says (2 Eq. Jur. sect. 768), this doctrine "has been universally rejected by the Courts of the various States."

Kent says (4 Com. 176): "This doctrine, harsh and unreasonable, as it strikes us, . . . was first solemnly established in *Marsh v. Lee*, under the assistance of Sir Matthew Hale, who compared the operation to a plank in a shipwreck gained by the last mortgagee; and the subject was afterwards very fully and accurately expounded by the MASTER OF THE ROLLS, in *Brace v. Duchess of Marlborough* (2 P. Wms. 491). It was admitted, in this last case that the rule carried with it a great appearance of hardship, inasmuch as it defeated an innocent second incumbrancer of his security.' The assumed equity of the principle is, that the last mortgagee, when he lent his money, had no notice of the second incumbrance; and the equities between the second and third incumbrancers being equal, the latter, in addition thereto, has the prior legal estate or title, and he shall be preferred. In the language of one of the cases, he hath 'both law and equity for him.' The legal title and equal equity prevail over the equity.

"The Irish Registry Act of 6 Anne has been considered as taking away the doctrine of tacking, for it makes registered deeds effectual according to the priority of registry. The priority of registry is made the criterion of title to all intents and purposes whatsoever: and this Lord REDESDALE considered to be the evident intention of the statute, but that it did not exclude anything which affects the conscience of the party who claims under the registered deed, nor give a priority of right to commit a fraud. This leaves the doctrine of a notice or a prior registered deed in full force: and this is the true and sound distinction which prevails in the United States, and I presume that the English law of tacking is with us very generally exploded. *Grant v. U. S. Bank*, 1 Caine's New York Cases, 112, February, 1801. This was the earliest

No. 50. — **Ibbottson v. Rhodes**, 2 Vern. 554. — Rule.

case that I am aware of in this country, destroying the system of tacking. In that case I had the satisfaction of hearing that profound civilian, as well as the illustrious statesman, General Hamilton, make a masterly attack upon the doctrine, which he insisted was founded upon a system of artificial reasoning, and encouraged fraud."

No. 59. — **IBBOTTSON v. RHODES.**

(1706.)

RULE.

A MORTGAGEE who would otherwise be entitled to priority may forfeit such priority by fraud or negligence, as well as by notice of the prior equity.

Ibbottson v. Rhodes.

2 Vern. 554-555.

Mortgage. — Priorities. — Neglect in making proper Inquiries.

A. lends money to B. on mortgage, but before he does so, sends C. to [554] inquire of D., who had a prior mortgage, whether he had any incumbrance on B.'s estate, who denied he had any. This was proved by C. D. by answer confessed C. inquired of him what money B. owed him; but denied C. told him that A. was about to lend B. any money. Decreed at the Rolls the estate should stand charged in the first place with A.'s debt. But upon an appeal, issue directed to try, whether C. told D. that A. was about to lend money on B.'s estate.

On an appeal from the Rolls, the case was, that the defendant Rhodes having lent money to Shipley, upon a mortgage of his estate, and Ibbottson being likewise about to lend Shipley money, one Gargrave, examined as a witness in the cause, deposed, that the plaintiff being about to lend money to Shipley, he, by the plaintiff's direction, inquired of the defendant, whether he had any incumbrance or mortgage on the estate, who denied he had any; and that he inquired a second time, and had the same answer.

The defendant by answer confessed that Gargrave met him in a public market, and inquired of him what money Shipley owed him; but denied that Gargrave told him, the plaintiff was about to lend Shipley money; nor did Gargrave upon his cross-examination take

upon him to swear it : but slides it in, that the plaintiff being about to lend money to Shipley, he inquired of the defendant, if he had any mortgage, &c. And although it was insisted upon for the defendant, that to take away the defendant's mortgage, or to make him lose or forfeit his money, it ought to be a very plain and positive proof, that the defendant industriously concealed his mortgage, as designing or contriving to induce the plaintiff to lend his money upon a bad security ; yet upon the evidence, the MASTER OF THE ROLLS decreed, that the estate should in the first place stand charged with [555] the plaintiff's debt, and that the defendant, although the first mortgagee, should be postponed for having concealed his incumbrance.

LORD KEEPER directed it to be tried at law, whether Gargrave told the defendant, that the plaintiff was about to lend money on Shipley's estate, when he inquired what the defendant's debt was ; and also directed that upon such trial, the answer should be admitted to be read as evidence.

ENGLISH NOTES.

In Fonblanque on Equity (5th ed.), p. 164, the principle of this rule is stated as follows : — ‘ If a man by the suppression of the truth which he was bound to communicate, or by the wilful suggestion of a falsehood, be the cause of prejudice to another who had a right to a full and correct representation of the fact, it is certainly agreeable to the dictates of good conscience, that his claim should be postponed to that of the person whose confidence was induced by his representation.’ See *Carter v. Carter* (1857), 3 K. & J. 617.

Where a mortgagee who was also a judgment creditor joined in a conveyance which recited contrary to fact that the judgment debt had been paid off, in a suit for redemption, the amount due on the mortgage having been paid to him, it was held that he could not set off the amount due on the judgment so as to refuse production of the deed of conveyance. *Cannock v. Jauncey* (1853), 1 Drew. 497.

Where concealment by a mortgagee of his incumbrance, without any actual misstatement, whereby a subsequent incumbrancer or purchaser is induced to believe that the property is free from such incumbrance, may amount to fraud, so as to postpone the prior security. *Berrisford v. Milward* (1740), 2 Atk. 49; *Strange v. Hawkes* (1853), 4 DeG. M. & G. 186, 196.

Misrepresentation or fraudulent concealment of an incumbrance by a solicitor or other agent of a mortgagee will bind the principal so as to

No. 59. — *Ibbottson v. Rhodes.* — Notes.

postpone the security. *Browne v. Thorpe* (1842), 11 L. J. Ch. 78. See *Boyd v. Craster* (1864), 12 W. R. 787, 10 L. T. 480.

Negligence in omitting to register a deed as required by statute may deprive a mortgagee of his priority. *Warburton v. Loveland* (1834), 6 Bligh (N. S.) 1. And see "Bill of Sale," 5 R. C. 38, and sub-titles "Registration," "Ships and Shipping," *post*. As a general rule, however, mere delay in completing the legal title will not, in the absence of fraud or negligence, affect the priority of a mortgagee. *Horlock v. Priestley* (1827), 2 Sim. 75, 29 R. R. 58.

AMERICAN NOTES.

This case is cited in 1 Story's Eq. Jur. sect. 393, and it is cited and its doctrine approved by Pomeroy (Eq. Jur. sects. 686, 687, 826, 1024, 1086), but he says, "The cases involving it are much less frequent in this country than in England, because almost every kind of interest in land is within the operation of the recording Acts, and may be protected by a record." See *Kelly v. Lenihan*, 56 Indiana, 448; *Eggeman v. Eggeman*, 37 Michigan, 436; *Fisher v. Knox*, 13 Penn. St. 622; 53 Am. Dec. 503; *L'Amoureux v. Vandenburg*, 7 Paige (N. Y. Ch.), 316; *Lee v. Munroe*, 7 Cranch (U. S. Sup. Ct.), 366; *Garland v. Harrison*, 17 Missouri, 282; *Brinckerhoff v. Lansing*, 4 Johnson Ch. (N. Y.), 65; 8 Am. Dec. 538; *Fay v. Valentine*, 12 Pickering (Mass.), 40; 22 Am. Dec. 397; *Marston v. Brackett*, 9 New Hampshire, 336; *Miller v. Bingham*, 29 Vermont, 82; *Broome v. Beers*, 6 Connecticut, 198 (citing the principal case); *Paine v. French*, 4 Ohio, 318; *Chester v. Greer*, 5 Humphreys (Tennessee), 26; *Heyder v. Excelsior, &c. Co.*, 42 New Jersey Eq. 403; 59 Am. Rep. 49; *McGehee v. Gindrat*, 20 Alabama, 95; *Woollen v. Hillen*, 9 Gill (Maryland), 185; *Holt v. Baker*, 58 New Hampshire, 276; *Keohane v. Smith*, 97 Illinois, 156; *Daws v. Craig*, 62 Iowa, 515.

The fraud in question may subsist in the mortgage itself, or in the mortgagee's conduct toward the purchaser of the estate, and the laches consists generally in omission to record, or to search the records, or to insist on production of the documentary evidence of title, or in want of care in dealing with the property, or in releasing part of the security without reduction of the debt.

Mr. Jones discusses this doctrine in 1 Mortgages, sect. 602-606.

A noteworthy application of the doctrine, is where a first mortgagee takes an absolute conveyance on a new mortgage, not intending to relinquish his priority, he still loses his priority over a second mortgagee. *Fræze v. Inslee*, 2 New Jersey Eq. 239.

If a mortgagee has by laches forfeited his right to foreclose, he also has lost his right of action on the mortgage-note. *Hibernia Sav. &c. Society v. Thornton*, 109 California, 427; 50 Am. St. Rep. 52; *O'Brien v. Moffitt*, 133 Indiana, 660; 36 Am. St. Rep. 566.

In *Heyder v. Excelsior, &c. Ass'n, supra*, it was held that if a mortgagee permits the mortgagor to retain the mortgage, and the latter fraudulently cancels it of record, the mortgagee cannot enforce it as against a subsequent *bonâ fide* grantee.

No. 60. — Hood v. Phillips. — Rule.

In *Fisher v. Knox*, 13 Penn. St. 622; 53 Am. Dec. 503, GIBSON, C. J., said : "The maxim, *Prior in tempore potior in jure*, holds, it is true, wherever it has not been inverted by enactment, as it has been by the recording laws so far as regards conveyances of land, or where the benefit of it has not been lost by misconduct or imprudence; but it must not be allowed to protect a party who has neglected a requisite precaution to protect from imposition those who may come after him."

In *Fay v. Valentine*, *supra*, a subsequent mortgagee was held estopped to redeem as against a prior mortgagee's assignee whom he had induced to purchase on the assurance that he would never redeem.

A first mortgagee will not be permitted in equity to assert his lien in preference to a grantor's lien for purchase money, a waiver of which he procured by a fraudulent device so as to let in his mortgage as a first lien, although the grantor agreed to take as security a second mortgage which on its face declared that it was subject to the lien of the first. *Hooper v. Cent. Trust Co. of N. Y.*, 81 Maryland, 559; 29 Lawyer's Reports Annotated, 262.

SECTION VIII.—*Merger and Discharge.*

No. 60.—HOOD v. PHILLIPS.

(CH. 1841.)

No. 61.—BURRELL v. EARL OF EGREMONT.

(CH. 1843.)

No. 62.—THORNE v. CANN.

(H. L. 1894.)

RULE.

WHERE a mortgage on the fee and the estate subject thereto become vested in the same person who is tenant in fee or in tail of the estate, it is presumed that the mortgage is merged in the inheritance of the estate and extinguished; but no such presumption arises in the case of an owner who is tenant for life. The presumption in either case is rebuttable by evidence of contrary intention.

No. 60. — Hood v. Phillips, 3 Beav. 513, 514.

Hood v. Phillips.

3 Beavan, 513–521.

Mortgage. — Payment by Will in Fee. — Merger.

Where the same person becomes absolutely entitled to an estate and a [513] sum of money charged upon it, the charge will be deemed extinguished unless it appears that the owner intended otherwise.

For the purpose of showing the intention, evidence direct and presumptive may be resorted to. A transfer to a trustee must be considered as one of the grounds rebutting the presumption of merger, but does not amount to decisive evidence against the presumption.

A. B., the owner in fee of an estate, paid off a mortgage in fee existing on it, which in 1807 was transferred to a trustee, in trust for A. B., her “heirs, executors, administrators, and assigns respectively:” and the trustee covenanted to convey to A. B., her heirs or assigns, or unto such other person or persons, and in such manner and form as A. B., her heirs, executors, administrators, or assigns should direct. A. B. devised the estate to a trustee to pay certain specified legacies, and subject thereto, she devised it to C. D. in fee, “and upon or for no other use, trust, intent, or purpose whatsoever.” A. B. died in 1832. *Held*, that the mortgage had merged.

The question in this case was, whether a mortgage in fee for £500 conveyed on certain trusts for the benefit of the owner of the equity of redemption had become merged.

In 1730, the owner of an estate called East Hook, mortgaged it in fee for the sum of £500.

On the 25th of February, 1807, this mortgage was in consideration of £500 transferred to John Phillips, who on the following day executed a declaration of trust, whereby he declared that the £500 paid for the transfer of the mortgage was the money of Elizabeth Lort (who was then the owner in fee of the East Hook estate), and that his name had been used in trust only, and to and for the sale and only proper use, benefit, and behoof * of [* 514] said Elizabeth Lort, her heirs, executors, administrators, and assigns respectively, and to and for no other use, intent, or purpose whatsoever. And John Phillips thereby, for himself, his heirs, executors, and administrators, covenanted with Elizabeth Lort, her heirs, executors, administrators, and assigns, that he and his heirs would, at any time or times thereafter, at the request, cost, and charges of the said Elizabeth Lort, her heirs, executors, administrators, or assigns, well and sufficiently convey, assign, and assure all and singular the hereditaments and premises, with their

No. 60. — Hood v. Phillips, 3 Beav. 514, 515.

appurtenances “unto the said Elizabeth Lort, her heirs or assigns, or unto such other person or persons, and in such manner and form as the said Elizabeth Lort, her heirs, executors, administrators, or assigns shall direct or appoint.”

Elizabeth Lort continued seized of the estate, and by her will, dated in 1829, she devised it to the defendant, John Lort Phillips in fee, upon trust, to pay an annuity of £20 a year to his brother for life, and upon trust to raise £1000 for certain persons named in the will. The will then proceeded as follows: “And subject unto and charged with the payment of the said annuity of £20 unto the said James Phillips for his life as aforesaid, and of the said five several sums of £200 each as hereinbefore mentioned, and all expenses whatsoever in any way incident to the execution of the aforesaid trusts, I give and devise the same messuages, hereditaments, &c., unto and to the use of my godson, Peregrine Lort Phillips, his heirs and assigns forever, and upon or for no other use, trust, intent, or purpose whatsoever;” and she gave her residuary personal estate to the two plaintiffs.

The testatrix died in 1832.

[* 515] * The plaintiffs, the residuary legatees by this will, prayed to have it declared that the £500 was a subsisting charge on the property, and to have the same paid or the mortgage foreclosed.

Mr. Kindersley and Mr. Lewis, for the plaintiffs, contended, that the testatrix had kept the charge on foot for the benefit of her personal estate. That the ordinary presumption was rebutted by her procuring a transfer to a trustee and not to herself, and specially by the declaration of trust for her, her heirs, executors, administrators, and assigns respectively; and by the covenant, whereby the trustee covenanted with her, her executors and administrators, to convey to such other person as she, her heirs, executors, administrators, or assigns should direct. They cited *Duke of Chandos v. Talbot*, 2 P. Wms. 605; *Donisthorpe v. Porter*, 2 Eden, 162; *Oswenden v. Lord Compton*, 2 Ves. Jr. 69 (2 R. R. 131); *Forbes v. Moffatt*, 18 Ves. 384 (11 R. R. 222); *Trevor v. Trevor*, 2 Myl. & K. 675; *Earl of Buckingham v. Hobart*, 3 Swanst. 186 (19 R. R. 197); *Thomas v. Kemneys*, 2 Vern. 348; *Chester v. Willes*, 1 Amb. 246.

Mr. Pemberton and Mr. Pitman, for the devisee of the estate. Where a person having an absolute interest in an estate, pays

No. 60. — Hood v. Phillips, 3 Beav. 515-517.

off a charge, it is extinguished, unless you can clearly show the intention that the charge should be kept alive. This may be done by express declaration, or from inference arising from the greater advantage to the party in keeping the charge alive for his benefit. It is impossible to suggest anything like an express declaration in this case, that the charge should be kept alive, and there is no possible purpose to be answered in preserving the charge independent * of the estate. The covenant in the declaration of trust is to convey the estate to Mrs. Lort, her heirs and assigns, or to such other person as she, her heirs, executors, administrators, or assigns should direct.

They argued that the terms of Mrs. Lort's will were conclusive on the point; for she devises expressly, subject to certain charges, "and upon or for no other use, trust, intent or purpose whatever;" this excludes the possibility of her intending the devisee to take, subject in addition to a mortgage of £500. They cited *Tyler v. Lake*, 4 Sim. 351; *Astley v. Milles*, 1 Sim. 298 (27 R. R. 190); *Perry v. Wright*, 1 Sim. & St. 369, 5 Russ. 142.

Mr. G. Turner and Mr. Bevir, for the representatives of John Phillips, the trustee.

Mr. Freeling, for John Lort Phillips, the trustee.

Mr. Kindersley in reply.

Lord LANGDALE, M. R. :—

In this case the testatrix, Mrs. Elizabeth Lort, was in her lifetime entitled to an estate called East Hook, and was also entitled to the sum of £500, charged on the same estate by way of mortgage. By her will she devised the estate subject to certain charges, to the defendant Peregrine Lort Phillips in fee; and she gave the residue of her personal estate to the plaintiffs, Elizabeth Hood and Mary Saunders.

The plaintiffs insist that the mortgage was kept up as a distinct charge, and they claim the £500 as part of the testatrix's personal estate.

* The defendant, Peregrine Lort Phillips, insists, that [* 517] as the estate and the charge thereon belonged to the same person, the charge ought, in this Court, to be deemed merged in the inheritance.

And the only question in the cause is, whether the mortgage for £500 was a subsisting charge at the time of the death of the testatrix.

No. 60. — Hood v. Phillips, 3 Beav. 517, 518.

The general rule in such cases is not in dispute. If the same person becomes absolutely entitled to an estate, and to a sum of money, which is charged upon it, this Court will deem the charge to have become merged in the estate, or to have become extinguished, unless it shall appear that the owner of the estate and of the charge intended otherwise.

For the purpose of showing the intention, evidence direct and presumptive may be resorted to; and the plaintiffs allege it to be clear, that the testatrix did not intend to pay off the mortgage for the purpose of relieving the estate or property on which it was charged, but for the purpose of keeping a portion of her personal estate so invested.

The mortgage was of very long standing, and in February, 1807, was vested in Henry Davis, who was entitled to the estate in fee, subject to redemption on payment of £500. Mrs. Lort was absolutely entitled to the equity of redemption.

The money was then paid off by Mrs. Lort; and on that occasion Henry Davis conveyed the estate, not to her, but to John Phillips, by a deed to which she was no party, and in which it was expressed that the mortgage was paid off by [518] Phillips; and that in *consideration thereof, the estate

was conveyed to him in fee, subject to redemption on payment of the mortgage money to him. On the following day, however, the 26th February, 1807, John Phillips executed a deed poll whereby he declared that the money with which the mortgage was paid off was not his, but Mrs. Lort's; and that, in the deed, his name was used only in trust for her; and by the deed it was expressed that he covenanted with her, her executors, administrators, and assigns, that he would, at her request, convey the estate to her, her heirs and assigns, or unto such other person as she, her heirs, executors, administrators, or assigns should direct.

In this case, therefore, the owner of the estate paying off the charge, caused a conveyance to be so made as not legally to extinguish the charge. The legal estate was left outstanding, and this was contended to be conclusive evidence that Mrs. Lort intended the charge to be kept on foot for the benefit of her personal estate; and the rather, because of the introduction of the words "executors and administrators" into the declaration of trust.

No. 60. — *Hood v. Phillips*, 3 Beav. 518-520.

The presumption being, that when the owner of an estate pays off a charge, he does it for the relief of the estate, a contemporaneous transfer of the charge to a trustee must be considered as one of the grounds upon which the presumption may be rebutted; but no instance has been cited in which such a transfer has of itself been held to be decisive evidence against the presumption, and I am of opinion that it ought not to be so.

The object is to collect the intention: and we must look at all the circumstances of the case, at the transfer, * at [*519] the trusts declared, and at the subsequent conduct of the party. Even if Mrs. Lort had intended in 1807 that the charge should be continued, the money and estate being her own absolutely, she was at liberty at any time to change her mind, which might have been different in 1829 when she made her will, and in 1832 when she died.

In this case Mrs. Lort was not content with merely causing the mortgage to be transferred to John Phillips; she also caused a declaration of trust to be executed. It is said, that at the time, her clear intention was to keep the mortgage on foot, and yet she has not said so; the declaration is silent as to that, and her intention in that respect (supposing it to be such as is alleged) is left as matter of implication and inference, from the mere fact of the transfer and the use which is made of the words "executors and administrators" in the deed. I am unable to adopt the reasoning which leads to the inference insisted on by the plaintiff. It appears to me, that if she really had intended to keep the charge on foot, the declaration of trust was an occasion on which the intention must have been clearly and unequivocally expressed, and the absence of any mention of the trust on which the money was to be held, or the mode in which it was to be applied, appears to me to afford evidence in support of the ordinary presumption far outweighing any evidence against the presumption, which the use of the words "executors and administrators" in an ill-drawn deed may be supposed to afford.

There is nothing to show that Mrs. Lort had any interest in keeping up the charge, and thinking that the transfer of the mortgage and the declaration of trust taken together do not afford sufficient evidence to rebut the ordinary presumption that she paid off the * charge to relieve the estate, it does not [*520] appear to me to be material to consider what advice or

 No. 61. — **Burrell v. Earl of Egremont**, 7 Beav. 205.

what motive induced her to cause the transfer to be made, as it was.

Twenty-two years elapsed between this transaction and the date of the will, and in the will no mention whatever is made of the mortgage money. Being the owner of the estate, and of the supposed charge upon it, she devises the estate to John Lort Phillips in fee, on trust to pay an annuity, and to raise certain sums by sale or mortgage, and subject to those charges and the expense of executing those trusts, she gives the estate to Peregrine Lort Phillips, his heirs and assigns, forever; and she adds the words, "and upon or for no other use, trust, intent, or purpose whatsoever."

It is very difficult for me to suppose that the testatrix, using these words, intended the estate given to her devisee to be subject to a claim by her residuary legatee for a sum of £500 charged on that estate. What the plaintiffs want is proof of intention to rebut the ordinary presumption in such cases; and the occasion of making the will was such as to make it probable, to say the least, that the testatrix would have distinctly and unequivocally expressed the intention, if she really had it.

If the charge had belonged to another person, it would have been in no way affected by the terms of the devise; and even in this case (the charge belonging to the testatrix), I do not think that the silence of the will on the subject of the charge is itself conclusive. But it corroborates the impression afforded by the other circumstances of this case; and, on the whole, I am of opinion that there is no sufficient evidence to rebut the

[* 521] *presumption that this lady, having paid off the mortgage, intended to extinguish the charge.

Dismiss the bill with costs.

Burrell v. Earl of Egremont.

7 Beavan, 205-238.

Mortgage. — Payment by Tenant for Life. — Presumption.

[205] If a tenant for life pays off a charge on the inheritance, he is *primâ facie* entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is that he pays the charge for his own benefit, and not for the benefit of the persons entitled in remainder; but evidence may show the contrary conclusion to be true.

No. 61. — *Burrell v. Earl of Egremont*, 7 Beav. 205-207.

A tenant for life paying off a charge upon the estate, and in the same transaction merging the security, by taking an assignment connecting it with the legal estate of inheritance, *prima facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge, without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention; the burden of proof is upon those who allege that in paying off the charge, he intended to exonerate the estate.

A. B., being tenant for life of the testator's real estates, subject to a charge of £25,000, and absolutely entitled to the residuary personal estate, paid off the charge, and obtained releases. At the time he seemed to have conceived that, as residuary legatee, he was liable to pay the amount out of the personal estate, which was sufficient for that purpose. Nothing was done to keep the charge on foot. After the death of the tenant for life, it being determined that the £25,000 was a primary charge on the real estate, *Held*, that it still subsisted as a charge on the settled estates for the benefit of the personal representatives of the tenant for life. . . .

The question in this cause was as to the right of the legal personal representatives of a tenant for life, of real estates to recover, as against the remainderman, *the amount of [*206] charges upon the estate which had been paid off by such tenant for life. The circumstances which gave rise to the question were shortly as follows:—

By the marriage settlement of Charles, Earl of Egremont, dated in 1750, a term of years was vested in trustees for the purpose of raising, out of an estate in Yorkshire, the sum of £25,000 for the portions of his younger children.

By his will dated in 1761, Charles, Earl of Egremont, appointed this £25,000 for the portions of his younger children, and gave directions as to the payment of interest and the time of payment, and provided that if any younger son should become an eldest son, or if any younger son or daughter should die without issue, before the time of payment, his or her portion should sink

*into the inheritance charged therewith, and not be raised [*207] or paid. He then devised his estates in Somerset, Dorset, and Cornwall (subject in the first place to the raising and paying the annuities and sums of money then affecting the same, or thereafter charged thereon by that his will, or any codicil he should thereafter think fit to add thereto) unto his eldest son George, and his assigns, for life, with various remainders over, under which the defendant, the present Earl of Egremont, had

No. 61. — Burrell v. Earl of Egremont, 7 Beav. 207, 208.

become entitled to the estates in possession. He then gave as follows: "I give and bequeath to my daughters Elizabeth and Frances the sum of £10,000 apiece, and to my sons Percy Charles and Charles William £2500 apiece, which several portions I will shall be in augmentation of, and as an addition to, the portions already provided for them by my said marriage settlement, and hereinbefore appointed to be paid to them as aforesaid, and shall be raised and paid to my said sons and daughters respectively, at such times and under such conditions, and subject to such contingencies, and with such interest, as I have before directed and appointed their original portions to be raised and paid by this my will. And I do hereby subject and charge my manors, &c. and hereditaments in the several counties of Somerset, Dorset, and Cornwall hereinbefore by me devised to my eldest son, with the raising and paying the said portions and sums of money to my said sons and daughters respectively, at the times and in the manner aforesaid."

After gifts of the mansion houses, and of an annuity of £300, and of certain personal estate as heirlooms, the testator gave certain pecuniary legacies, which he directed to be exclusively paid out of certain particular parts of his personal estate. And then he gave all the residue of his personal estate, after payment of his debts and funeral expenses, and the legacies afore-

[* 208] said, *to his eldest son; and he added a proviso, that if

his personal estate should not extend to pay such of his debts as should not be charged on his real estate, and his said funeral expenses and legacies, then he charged his estates in Somerset, Dorset, and Cornwall, in aid and to make good any deficiency that might happen in his said personal estate. "And for that end and purpose," he empowered the trustees to raise by sale or mortgage of the estate, and pay, "not only the sums of money and portions thereinbefore by him charged and secured on the said premises, for his younger children, and such deficiency as should happen in his personal estate to pay his debts and legacies," but also such sums of money as should be necessary for the other purpose in his will mentioned.

Earl George attained his age of twenty-one in the year 1772, and in May, 1773, he, out of his own moneys, paid the original and additional portions of his sister Lady Elizabeth, and on that occasion the real and personal estate of Earl Charles were

released.¹ In 1776, Earl George, out of his own moneys paid the original and additional portions of Lady Frances, and obtained a release, as heir of the Lady and executor of his father.¹ In 1778 and 1781 respectively, he in like manner paid the original and additional portions of Percy Charles and Charles William, who thereupon executed releases.¹ During his life Earl George did not indicate whether he intended the additional charges paid off by him to merge for the benefit of those entitled in remainder or not.

Earl George died in 1837. By his will he, amongst other things, devised his hereditaments in the counties of Wilts, Somerset, Devon, Dorset, and Cornwall to the *defendant [* 209] Earl George Francis, and the heirs male of his body, and in default of such issue, unto the persons, and for such estates, as the estates in the same counties were by the will of Charles, Earl of Egremont, devised, after failure of the heirs male of his body.

This bill was filed by the legal personal representatives of George, Earl of Egremont, seeking to have the £25,000, bequeathed, in addition, by the will of Earl Charles to his younger children, and which had been paid by George, Earl of Egremont, to his brothers and sisters, raised out of the real estates of which he had been tenant for life, and to which estates the present Earl had now become entitled.

The defendant resisted this claim on three grounds: First, he said that the sum of £25,000 was a mere legacy, primarily charged on the personal estate of Charles, Earl of Egremont, admitted by all parties to have been sufficient for its payment; and that as it was charged on the real estate as an auxiliary security only, and had been properly paid out of the personal estate, the residuary legatee had no right to a reimbursement. Secondly, that even if it were primarily charged on the real estate, still George, Earl of Egremont, did not intend, when he paid it off, to keep it alive, but to have it released, and that it had been released accordingly. Thirdly, that if the right claimed by the plaintiffs ever existed, it was now barred by the Statute of Limitations.

Mr. Pemberton Leigh, Mr. Turner, Mr. Lee, and Mr. Piggot, for the plaintiffs. . . .

Where a person seised in fee or in tail pays off a charge [210] on the estate, it depends on his intention, * whether the [* 211]

¹ The deeds executed on these occasions are more fully stated in the judgment of the MASTER OF THE ROLLS (p. 547 *et seq.*).

 No. 61. — *Burrell v. Earl of Egremont*, 7 Beav. 211–217.

charge is kept alive or not: if it be a matter of indifference, and he has expressed no intention on the subject, the charge is held to have merged; but where a party dies without any indication of his intention, the Court considers what would be most beneficial to him, and it is immaterial whether at law the charge has merged or not. *Forbes v. Moffatt*, 18 Ves. 384 (11 R. R. 222). Though it be merged at law, still it may be subsisting in equity. Here the party was not the owner of the estate, but was merely tenant for life; the presumption, in such a case, is in favour of the charge being preserved, and the *onus* of proof of the contrary lies on the remainderman. It is not sufficient to show a vague intention, but the Court must be satisfied that the tenant for life relieved the estate from the charge, with the intention of never claiming it, and that, in fact, he intended to make a present of the amount of the charge to the remainderman. In *Drinkwater v. Combe*, 2 Sim. & St. 340 (25 R. R. 210), Sir JOHN LEACH said: "If a tenant for life pay off a charge upon his estate, the amount becomes a part of his personal property, unless he manifests an intention that it shall not do so." In *Treeror v. Treeror*, 2 Myl. & K. 675, a tenant for life in remainder redeemed the land tax, and afterwards became entitled to the estate in fee, and devised it by his will. Sir JOHN LEACH said: "When Lord H. took the assignment of the land tax to himself, that act amounted to a declaration of his intention that the land tax redeemed should be part of his personal estate. It could not afterwards sink into the real estate without his expressed intention to that effect, and there is no evidence of any such intention. It continues, therefore, to be part of his personal estate."

[* 212] * In the present case, Earl George never evinced any intention. The deed shows that he was altogether ignorant of his rights, and by a mistake, originating during his minority, the personal estate was considered primarily liable. All the subsequent deeds proceed on the same error. The Court will relieve in such cases. *Earl of Buckinghamshire v. Hobart*, 3 Swan. 186 (19 R. R. 197). . . .

. Mr. Finney, Mr. Kindersley, and Mr. Lloyd *contra*. . . .

[217] Suppose the personal estate exonerated, then as to the effect of the acts done by Earl George. The rule is thus laid down by Lord THURLOW in *Jones v. Morgan*, 1 Bro. C. C. 218:

No. 61. — *Burrell v. Egremont*, 7 Beav. 217-220.

“A tenant for life, in general, paying off a charge, without taking an assignment, is a creditor for the sum so paid; but the smallest demonstration that he meant to pay it off will prevent his representative from coming for the money.” Is there not something more than “the smallest demonstration” in the present case? Earl George, being tenant for life, with remainder to his own issue, it was quite natural for him, upon attaining twenty-one, and finding himself in possession of considerable personal estate, to release the family estate from the incumbrance for the benefit of those who might succeed him. When he paid off the charges, no transfer was made of them to a trustee for himself, as would have been done if he intended to keep them on foot; but they were absolutely released and merged in an inheritance. From 1772 to 1837 not the slightest trace appears of any intention to keep the charges on foot, or that Earl George even supposed them to be in existence, and no claim was made by any one till his death.

The dispositions contained in the will of Earl George are quite inconsistent with the notion that he intended the settled estates in Somerset, Dorset, and Cornwall should remain charged with the £25,000, for he devises to the defendant his own fee simple * estates in those counties, clearly intending, so [* 218] far as he could, to augment those estates which were to go with the title. . . .

Mr. Lee in reply.

[219]

(Lord LANGDALE, M. R.) reserved his judgment.

April 17. Lord LANGDALE, M. R.:—

This bill is filed by the legal personal representatives of the late George, Earl of Egremont, against the present * Earl, [* 220] and it prays that an account may be taken of the principal money and interest alleged to be due to the plaintiffs in respect of a sum of £25,000 charged on certain estates in the counties of Somerset, Dorset, and Cornwall by the will of Charles, Earl of Egremont, the father of the late Earl George, and the grandfather of the defendant, and that the amount of what shall be found due may be raised by sale or mortgage of a sufficient part of the estates, and paid to the plaintiffs.

By a settlement, dated the 26th of February, 1750, and made on the marriage of Earl Charles, certain estates in the county of York were vested in trustees for a term of 600 years, in trust for raising by mortgage or sale £25,000 for the portions of his younger children.

In the month of July, 1761, there were five children of the marriage, George the eldest son, and four younger children; namely, Percy Charles, Charles William, and the ladies Elizabeth and Frances, who were together entitled to the £25,000 provided for their portions by the settlement; and Earl Charles, by his will dated the 31st of July, 1761, appointed the £25,000 as follows: viz. £10,000 to Lady Elizabeth; £10,000 to Lady Frances; £2500 to Percy Charles; and £2500 to Charles William.

By the same will, he devised his estates in Somerset, Dorset, and Cornwall to his eldest son, the late Earl George, for life, with remainder over, by virtue of which the defendant became entitled to those estates; and he gave to his daughters Elizabeth and Frances, £10,000 apiece, and to his sons, Percy Charles and Charles William, £2500 apiece, and calling these sums of money portions, he subjected and charged his estates in Somerset, Dorset, and

Cornwall, which he had devised to his eldest son, with the [*221] raising and paying the same; and after *bequeathing certain legacies, he gave the residue of his personal estate to his eldest son. He appointed his wife and brother guardians of his children, and appointed his wife sole executrix until his eldest son George should attain twenty-one years of age, and after that time appointed his eldest son George sole executor.

After the date of the will, the testator had a fourth son, William Frederick, the father of the defendant, and by a codicil dated the 22nd of June, 1763, he made provision for his son William Frederick, but the directions as to the portions which by his will he had given to his other younger children were not altered.

After the death of Earl Charles, his eldest son being still a minor, the will and codicil were proved by the widow, who possessed the personal estate; but after Earl George attained his age of twenty-one years, he proved the will and codicil, and became the sole legal personal representative of his father Earl Charles.

The portions provided for his younger children by the will of Earl Charles were paid by Earl George out of his own money, and on the occasion of each payment, certain deeds were executed, and releases were taken from the sons and daughters to whom the payments respectively were made. The last payment was made in the month of January 1781, from which time it does not appear that any mention was made of the portions during the life of Earl George, who died on

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the 11th of November, 1837, having made a will whereof the present plaintiffs are executors.

His lordship then considered the first point raised by the plaintiffs, and taking the whole of this will into consideration, [226] was of opinion that the effect of it is to make the additional portions given to the younger children a primary if not an exclusive charge upon the estates in Somerset, Dorset, and Cornwall devised to the eldest son for life.

His Lordship then continued as follows:—

We have next to consider the effect of the several acts done by Earl George with reference to the payment of the several portions to his brothers and sisters. If a tenant for life pays off a charge on the inheritance, he is, *primâ facie*, entitled to that charge for his own benefit; but he may, if he think proper, exonerate the estate. In the absence of evidence, the presumption is *that he pays the charge for his own benefit, and not for [* 227] the benefit of the persons entitled in remainder; but evidence may show the contrary conclusion to be true.

The Lady Elizabeth Alicia Maria was married to Mr. Henry Herbert in the year 1771, and upon that occasion two instruments were executed, and an account stated; and by one of the instruments it was recited that the Lady Elizabeth was, by virtue of the settlement executed before the marriage of the late Earl Charles, and by his will, entitled to two sums of £10,000 each, amounting together to £20,000 for her fortune or portion, and that the said two sums of £10,000 and £10,000 were charged upon and to be paid out of the real and personal estates of Earl Charles; and by the other of the instruments, after reciting the settlement and the will of Earl Charles, it was further recited, that upon the treaty for the intended marriage, it had been proposed and agreed that the several principal sums of £10,000 and £10,000, the original and additional portions of the Lady Elizabeth, so charged upon and payable out of the real and personal estates of Earl Charles, should be assigned as therein mentioned; and by the account then stated it appeared that the interest of one sum of £10,000 was paid by the guardians of Earl George, and that the interest of the other sum of £10,000 was paid by the Countess, the executrix of the late Earl Charles.

Earl George attained his age of twenty-one years on the 18th of December, 1772; and on the 11th of May, 1773, he paid the sum

of £20,000 pursuant to an arrangement made on the marriage of his sister the Lady Elizabeth to Mr. Herbert; and upon that occasion, a deed was executed by and between Mr. Herbert and the Lady Elizabeth of the first part, the Earls of Pembroke, [* 228] Ashburnham, * and Thomond, and Charles Herbert, of the second part, the Countess Dowager of Egremont and the Earl of Aylesford of the third part, and George, Earl of Egremont, therein described as the eldest son and heir and executor of the will of his father Earl Charles, and also residuary legatee in the same will named, of the fourth part; and thereby, after reciting amongst other things, that Earl George had attained his age of twenty-one years, and thereupon became entitled in possession to, and soon afterwards entered upon, the real estates limited and devised to him by the settlement and will of Earl Charles, and upon which, or upon part of which, the principal sum of £10,000, the original portion of the Lady Elizabeth, stood charged, and that the said Earl George also, upon attaining his age of twenty-one years, became entitled to the residuary personal estate of his father which had been accounted for and satisfied to him by his guardians; and that having entered upon his real estates and possessed himself of his father's residuary personal estate, he was desirous to pay off and discharge the several sums of £10,000 and £10,000, being the amount of the original and additional portions of his sister, Lady Elizabeth, it was witnessed, that under the circumstances and for the reasons therein mentioned, the Earls of Pembroke, Ashburnham, and Thomond, and Charles Herbert, assigned the said two sums of £10,000 and £10,000 to Henry Herbert, and appointed Earl George as executor, residuary legatee, and heir to his deceased father, and in every other right and capacity him thereunto requiring, to satisfy the same sums of £10,000 and £10,000 to the said Henry Herbert, and the same were accordingly paid; and the said Henry Herbert acknowledged the receipt thereof, in full satisfaction of the original and additional portions of the Lady Elizabeth and of all claims and demands in respect thereof, [* 229] upon the estates real and personal of * Earl Charles, or upon the Dowager Countess, and the Earl of Thomond, or either of them; and Henry Herbert released them, and all and singular the estates real and personal of Earl Charles, from the same, and covenanted to do any other act required for further releasing the same, and better extinguishing the same sums of

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money and all claims of Henry Herbert and Lady Elizabeth, by reason thereof, or upon the estates of Earl Charles.

In the same month of May, 1773, and by deed dated the 11th of the same month, and made between Earl George, described as the eldest son and heir of Earl Charles, of the one part, and the Dowager Countess and the Earl of Thomond and John Drummond of the other part, after reciting, amongst other things, that there was standing in the names of the Earl of Thomond and John Drummond, the capital yearly sum of £2186 7s. 5d. consolidated long annuities, which had been purchased out of the surplus produce of the real and personal estates of Earl George, during his minority, and were his absolute property in his own right, and that the portions of Lady Elizabeth had been paid, and that the Lady Frances being in the eighteenth year of her age, and her portions being payable at her age of twenty-one years or day of her marriage, Earl George, in order to exonerate, as well the residuary personal estate of his late father, of and from the payment of the additional portion, legacy, or sum given to the Lady Frances by her father's will, and also the settled estates, and all other the estates real and personal of Earl Charles, of and from the original portion or like sum of £10,000 provided for Lady Frances by the settlement, and to secure and provide for the more immediate payment of the several portions or sums of money, when and as the same should respectively become payable, had proposed and agreed that the yearly sum of £784 6s. 3d.

long * annuities, part of the yearly sum of £2186 7s. 5d. [*230] long annuities before mentioned should be appropriated and set apart to answer and pay the several portions of the Lady Frances, when the same should become payable; and after reciting that for the same purposes Earl George had proposed and agreed, that the yearly sum of £392 3s. 2d. long annuities should be appropriated and set apart to answer and pay the portions and additional portions, by the settlement and will of Earl Charles provided for his younger sons Percy Charles, and Charles William. It was, by the said deed, witnessed that the same long annuities should be appropriated and set apart for the purposes of the recited arrangement.

By another deed, also dated the 11th day of May 1773, after reciting the matters aforesaid, Earl George, allowed the accounts of his mother and guardians and released his claims as residuary legatee.

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On the 9th day of July, 1776, the Lady Frances attained her age of twenty-one years. Soon afterwards, the long annuities set apart to answer her portions were transferred into her name, and thereupon, by deed poll dated the 29th August, 1776, she acknowledged that she accepted the same in full satisfaction of her portions under the settlement and will of her father, and she released Earl George, as well in his own right, as in his character of heir of the body and executor of his father.

Percy Charles attained his age of twenty-one years on the 27th of September, 1778, and Charles William attained his age on the 8th of October, 1780. At these times respectively the long annuities provided to answer the portions were insufficient for

the purpose; the sums required to make up the deficiencies [* 231] were supplied by * Earl George, and the younger sons,

Percy Charles, and Charles William, upon receiving the long annuities and the sums to make up the deficiencies, *i. e.* upon receiving their whole portions, executed releases dated, as to one of them, on the 25th of December, 1778, and as to the other of them, on the 31st of January, 1781.

We cannot now know what Earl George might have said or done, if he had been told that the charge of the additional portions — exclusively or primarily — affected the estates in Somerset, Dorset and Cornwall: — that he was under no obligation to pay the same out of his own money, and that paying the same, he would be, or was personally entitled to the benefit of the charge. Under the circumstances, it is possible, perhaps not improbable, that he might have desired and declared his intention to exonerate the estate; but, after a careful consideration of the deeds which were executed on the several occasions on which the portions of the younger children were provided for and paid, I am of opinion that the question was never brought to his attention. The original portions were known to be charged on the York estates, and were so treated; and there are expressions in the deeds which are to be explained with reference to them, and to the estates on which they were charged; but it seems to be clear that Earl George conceived himself, as executor and residuary legatee, bound to pay the additional portions out of his own money, or the personal estate of which he was residuary legatee. He was ignorant that the additional portions were properly and primarily chargeable on the real estates, of which he was tenant

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for life; and the nature of the charge being unknown, and unalluded to in the deeds, they contain no indication whatever of intention either to continue the charge or to exonerate the estate.

* A tenant for life paying off a charge upon the estate, [* 232] in the same transaction merging the security, by taking an assignment, connecting it with the legal estate of inheritance *primâ facie* puts an end to the charge; but something is required to manifest an intention to exonerate the inheritance. A simple payment of the charge without more, is sufficient to establish the right of the tenant for life to have the charge raised out of the estate. He has no obligation or duty to make a declaration, or to do any act demonstrating his intention. The burden of proof is upon those who allege that, in paying off the charge, he intended to exonerate the estate.

In this case, there is no evidence whatever, except that which may be derived from the execution of the several deeds which have been stated; and as it does not appear from those deeds that Earl George knew his rights, it cannot be collected from them, that he intended to waive, or in any way relinquish, his rights. The words of the deeds are fully satisfied, and are explicable only on the supposition that he did not know that he had any right to have the additional portions raised out of the devised real estate, and that he did understand it to be his obligation to pay them out of the personal estate or his own money.

If it had been necessary to show, otherwise than by legal presumption, that Earl George intended to continue the charge, it would have been impossible to prove it, because it does not appear that he knew there was a primary charge, and the plaintiffs could not have proved that he intended to continue a charge, the existence of which, as a primary charge, was unknown.

* The difference between the situation of the plaintiffs [* 233] and that of the defendant is this,—that there is a presumption in favour of the plaintiffs and not in favour of the defendant. In the relation which subsisted between Earl George and the estate, the law presumes, that in paying off the sum charged, he did not intend to exonerate the estate.

It may be true, that if Earl George had known the nature of the charge, and that he might have raised it for his own benefit, he might have thought fit to exonerate the estate; but this is no

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more than conjecture, and, in the absence of sufficient evidence, it cannot countervail a legal presumption, and I am under the necessity of concluding, that Earl George did not, by his acts, upon payment of the portions, exonerate the estates from the additional portions charged thereon by the will of Earl Charles, and that after the payment of the portions in the year 1781, Earl George was entitled to have the amount raised for his own benefit. . . .

[238] Under the circumstances, and for the reasons I have stated, it appears to me that the plaintiffs are entitled to the relief which they pray.

Declare, that according to the true construction of the will of Earl Charles, the additional portions, amounting to £25,000, thereby given to the younger children therein named, constitute a primary charge on the estates by the said will devised to the testator's eldest son for his life; and that Earl George, the tenant for life of those estates, having paid the same additional portions to the persons entitled thereto out of his own moneys, became and was, and up to the time of his death continued to be, entitled to the same charge for his own benefit, and that the plaintiffs, as his legal personal representatives, are now entitled thereto, as part of his personal estate. Take an account of what is due, and decree the amount to be raised.

The defendant appealed, but the case was afterwards compromised, by the plaintiffs making some concessions.

Thorne v. Cann.

1895, A. C. 11-19 (s. c. 64 L. J. Ch. 1 : 71 L. T. 852).

[11] *Mortgage. — Purchase of Equity of Redemption. — Transfer of Mortgage to Owner of Equity of Redemption. Intention to keep Security alive.*

Where the owner of an equity of redemption pays off a mortgagee and takes an assignment of the mortgage, and the documents or circumstances show an intention to keep alive the security, it is not extinguished but enures for the benefit of the owner of the equity of redemption.

Appeal from a decision of the Court of Appeal.

Piller, owner of freehold hereditaments in Devon, by deed of the 3rd of May, 1880, mortgaged them to Rendell to secure £300. By deed of the 28th of September, 1880, Piller mortgaged the same

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property to Forward to secure £150. By deed of the 29th of September, 1882, to which Piller was a party, Rendell's mortgage was transferred to Miss Arnold, and in consideration of a further sum of £700 advanced by her the property was charged as security to her for the two sums of £300 and £700, making £1000. By deed of the same date Piller mortgaged the property to Henry Thorne, the appellant's testator, to secure £600.

On the 26th of August, 1885, Piller was adjudicated bankrupt. By writing of the 23rd of February, 1886, Searle agreed with Piller's trustee in bankruptcy to purchase the equity of redemption of the property and to release the trustee and the bankrupt's estate from all claims which he (Searle) had against the estate.

By deed of the 18th of May, 1888, Miss Arnold assigned her mortgage for £1000 to Searle, a solicitor, under the circumstances stated in the judgment of Lord HERSHELL, L. C. By deed of the 22nd of June, 1888, Searle assigned that mortgage to the respondent.

In the above transactions Searle acted as solicitor for Piller, * Rendell, Forward, Miss Arnold, and the respondent [* 12] respectively, and gave to Forward, Miss Arnold, and the respondent respectively undertakings that he would take a transfer of their securities after notice requiring him to do so, or at his option make good any deficiency which might arise on the realisation thereof.

On the 2nd of June, 1892, the respondent, under the power of sale in his mortgage, sold the property by auction to the appellant's testator, and afterwards brought an action against him for specific performance. The defendant objected to the title on the ground that there was no power of sale, contending that Miss Arnold's mortgage was extinguished when it purported to be transferred to Searle, and he counter-claimed for a declaration that his mortgage had priority over any charge of the respondent's, and for an order rescinding the contract of sale. ROMER, J., holding that there was an expressed intention to keep alive the mortgage transferred by Miss Arnold to Searle, decreed specific performance and dismissed the counter-claim, and this decision was affirmed by the Court of Appeal (LINDLEY, KAY, and A. L. SMITH, L. JJ.).

During the action the defendant died and the proceedings were continued against the appellant, his executrix.

1894. Nov. 16, 19. Cozens-Hardy, Q. C., and W. F. Philpotts for the appellant:—

The purchaser of an equity of redemption cannot set up a mortgage which he has got in against a subsequent incumbrance of which he had notice: *Toulmin v. Steere*, 3 Mer. 210, a case often observed upon, but never overruled and still law. Searle's intention to set up the mortgage makes no difference, for the only exception to the rule in *Toulmin v. Steere* is where on the purchase of the equity of redemption there is an agreement with the mortgagor that the purchaser may keep mortgages on foot, or if no agreement there is evidence that this was the intention: see judgment in *Adams v. Angell*, 5 Ch. D. 634. Searle made no such stipulation in his purchase, and there was no evidence of intention. But the appellant need not rely on *Toulmin v. Steere*.

The respondent derives his title from Searle, who was in [* 13] the * position of mortgagor, and the respondent cannot be in a better position than his vendor or transferor. The language of KNIGHT BRUCE, L. J., in *Watts v. Symes*, 1 D. M. & G. 240, 244, applies: "A person who borrows money cannot be his own creditor, or set up an incumbrance of his own against his creditor." In *Otter v. Lord Faux*, 6 D. M. & G. 638, a mortgagor buying the estate from a first mortgagee who sold under a power of sale was held not to have defeated the title of the second mortgagee, and the second mortgagee was thus advanced to the position of having the first charge.

[Lord MACNAGHTEN referred to Davidson's Conveyancing, vol. 2, pt. 1, p. 324 (4th ed.), and to *Banks v. Whittall*, 1 De G. & Sm. 536.]

The same doctrine was enforced in *Parry v. Wright*, 1 S. & S. 369; affirmed on appeal, 5 Russ. 142, and *Brown v. Stead*, 5 Sim. 535. See also *Smith v. Phillips*, 1 Keen, 694; *Mangles v. Dixon*, 3 H. L. C. 702, 737.

There was no intention to keep alive the mortgage to Miss Arnold; she called in her money and Searle was under an obligation to pay her off. If there was such an intention it was not expressed so as to defeat the rule of equity.

Haldane, Q. C., and F. Hoare Colt, for the respondent, were not heard.

Lord HERSCHELL, L. C.:—

My Lords, the question in the action was whether the respon-

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dent had made out a good title to sell. One objection, and one only, to that title was taken and argued before the Court of First Instance, and in this House I think it is not open to your Lordships to consider any other point but that single one so taken.

The property had originally belonged to a Mr. Piller. He mortgaged it in the first instance for the sum of £300. He then mortgaged it to a Mr. Forward for the sum of £150. Subsequently to that mortgage to Forward an arrangement was * come to that the first mortgage of £300 should be trans- [* 14] ferred to a Miss Arnold, and that she should also have a further charge of £700, so that she became a mortgagee for £1000. It may be that as regards that £700 there was a priority on the part of Forward: but I do not think it will turn out that that is material so far as the question now to be determined is concerned. Afterwards there was a mortgage to Thorne, the appellant's testator. The mortgage transactions appear to have been carried out through the medium of Mr. Searle, a solicitor who acted for both sides, and he gave an undertaking to each of the mortgagees, by which he in effect guaranteed the mortgage, because he undertook either to take a transfer of the mortgage, or at his option to make good any deficiency which might arise on the realisation thereof. None of the parties could insist upon his taking a transfer; but if he did not take a transfer they could each of them insist that if upon the realisation of the security there was a deficiency he should make good that deficiency. Piller, the mortgagor, afterwards became bankrupt, and under his bankruptcy, Searle bought the equity of redemption from the trustee in bankruptcy, and thus became the owner of it. Miss Arnold desired to receive the mortgage money. Accordingly she entered into communication with Mr. Searle with that object. Thereupon he, not having the money or not being prepared to advance the money himself, went to the Devon and Cornwall Bank, with whom he had an account, and obtained £1000 from them on a special advance with the view of obtaining the money to pay to Miss Arnold. At that time it would seem that he was in negotiation with a Mr. Cann with a view to his taking the mortgage; but it was a mere matter of negotiation and no absolute agreement had then been come to on the subject. But this is certain, that he obtained £1000 from the bank, and that it was

the intention of himself and of the bank that the bank should receive the mortgage security which he was going to discharge. I think that is perfectly clear from the answers given by the bank manager (and there is nothing in Mr. Searle's evidence inconsistent with it) and from the documents put in. The bank manager says:

"I knew nothing about Miss Arnold or Mr. Cann, because [* 15] frequently he had got no client. I have had * many transactions with him. If a client asked him to pay off a mortgage he would come to the bank if he had not got another client ready, and we would wait until he had one." Now, what is the meaning of that but that they were to find the money to pay off the mortgagee? That is, they, advancing the money, were to have the benefit of the mortgage security until he found a new client who should afford the means of paying the money back to the bank, when that new client was to have the security. That obviously was the intention of both Mr. Searle and the bank. Under those circumstances he receives the money from the bank, and he pays Miss Arnold; he takes an instrument from her, to which I will call attention in a moment, and he deposits the deeds with the bank. A month or so afterwards Mr. Cann advances £900 and takes from Mr. Searle an assignment of the security.

The instrument executed by Miss Arnold witnesses that "in consideration of the sum of £1000 this day paid to the said Jane Owen Arnold by the said James Searle (the receipt whereof the said Jane Owen Arnold doth hereby acknowledge), she the said Jane Owen Arnold as mortgagee doth hereby assign unto the said James Searle, his executors and assigns, all that the said sum of £1000 now owing to the said Jane Owen Arnold on the security aforesaid, and all interest henceforth to accrue due for the same, and the full benefit of the covenants entered into by the said James Piller in the said indentures and of all other securities for the same premises, and all the estate and interest of the said Jane Owen Arnold in the premises and every part thereof." That was the nature of the instrument executed, and it purports, as will be seen, to assign the mortgage debt and all the securities held in respect thereof. I do not think, as I have already said, that it can for a moment be doubted, looking at the circumstances existing at the time when the money was paid to Miss Arnold and the instrument taken, that it was the intention of Mr. Searle to keep this security alive. It appears to me

that such intention is indicated by the form of the instrument taken. I cannot myself conceive, when the owner of the equity of redemption paid Miss Arnold, the mortgagee, what was the object of his taking to himself the assignment of the mortgage *debt, and all benefits and rights in respect of it, if it was [* 16] not to keep alive that security.

Now, my Lords, that having been the intention which I infer from the instrument itself, and from the surrounding circumstances at the time, is that intention defeated by some rule of law which prevents effect being given to it? Reliance has been placed by the learned counsel for the appellant upon the case of *Toulmin v. Steere*, 3 Mer. 210. That is a case which certainly has not met with universal acceptance; it has been often commented upon and criticised adversely. It appears that an appeal was contemplated, although circumstances rendered it unnecessary; and possibly the decision might be open to reconsideration in your Lordships' House. But it is not necessary to determine any such point on the present occasion, because if *Toulmin v. Steere* be accepted as good law it does not, in my opinion, govern the present case. In *Toulmin v. Steere* the owner of the equity of redemption had purchased the property with the intention of paying off all the mortgages upon it, and thought all the mortgages had been paid off out of the purchase-money. One mortgage had been omitted; but so far from the intention there being to keep any of the mortgages alive, the intention was to extinguish all the mortgages, and it was believed that such intention had been successfully accomplished.

In the case of *Adams v. Angell*, 5 Ch. D. 634, as here, the equity of redemption had been purchased from a trustee under a bankruptcy. The question was whether the mortgage security had been kept alive, and the principle laid down by JESSEL, M. R., in giving his judgment is this: "That in all these cases the question is one of intention; and looking at the terms of the deed, by the light of the surrounding circumstances, I am of opinion that an intention was clearly shown not to let in Newsom" (the subsequent mortgagee in that case) "except on the terms of his paying Adams his principal, interest, and costs." My Lords, adopting that principle, I say, here, looking at the terms of the deed, which, I think, would of themselves be sufficient where there is nothing pointing to the contrary, I am of opinion that the

[* 17] intention was to keep the security alive. It * seems to me one method, recognised by conveyancers, of expressing such an intention is to take an assignment of the mortgage security. But if you are to look at the terms of the deed, in the light of the surrounding circumstances, so far from these pointing the other way they all, to my mind, point in the same direction, and indicate, beyond any possibility of dispute, that this was the intention.

Reliance has been placed by the appellant upon the documents, and among them the undertaking to which I have referred given by Mr. Searle. I do not think they militate against the respondent's case. It is said that they explain why it was that the transfer was taken from Miss Arnold in this form. They do; they show that it was intended to be a transfer of the mortgage — as excellent a way of expressing the intention of the parties as could well be conceived.

For these reasons, my Lords, I think the judgment of the Court below is perfectly correct and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

Lord WATSON: —

My Lords, I concur. I am satisfied that it was the intention of James Searle, the owner of the equity of redemption, to keep on foot the mortgage which he acquired from Miss Arnold, and subsequently transferred to the respondent. I think that is a reasonable inference from the tenor of the documents by which these transactions were carried out, and the only inference consistent with the circumstances attending their execution.

That inference, in fact, is sufficient to dispose of this appeal. It seems clear that in such circumstances intention must prevail, notwithstanding the very doubtful authority of the rule laid down in *Toulmin v. Steere*, 3 Mer. 210.

Lord MAGNAGHTEN: —

My Lords, I do not think there is any foundation for this appeal in principle or authority.

The case of *Toulmin v. Steere*, which was pressed into [*18] the *service of the appellant, has not, as it seems to me, any application to the present case. The facts in the two cases are not the same, nor is there, I think, any real resemblance between them.

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In *Toulmin v. Steere*, 3 Mer. 210, it was decided that a purchaser who took a conveyance purporting to be free from incumbrances could not set up a mortgage which had been paid off out of the purchase-money against an incumbrance subsequent in date of which he had constructive notice. The authority of that case cannot nowadays be treated as going beyond the actual decision. Whether it would be regarded as a binding authority in a case on all-fours with it, except in a Court of First Instance, is at least doubtful. It would not, I think, on the present occasion be proper to go beyond what has been said about it in *Stevens v. Mid-Hants Railway Company*, L. R. 8 Ch. 1064, and *Adams v. Angell*, 5 Ch. D. 634. But I may remind your Lordships of an observation which was made by JAMES, L. J., in the former case, and which is not, I think, without application to the case now before your Lordships. "Of course, it is quite right," said his Lordship, "that an intermediate incumbrancer should not be prejudiced by any dealings between his debtor and another incumbrancer. At the same time it is not for this Court to find some recondite technical reason for giving a man a benefit at the expense of another man who was under no liability whatever to pay him."

The material facts in this case are very simple. When Searle agreed to buy the equity of redemption from Piller's trustee in bankruptcy he became the owner of the estate subject to certain charges. The debts which those charges were intended to secure were not his debts, nor was he personally liable to pay them. I do not forget the undertakings which Searle had given. But those undertakings did not make the debts his or bind him to pay so that he could be sued as debtor. There was nothing inconsistent with Searle's duty to Thorne in his performing his undertaking to Miss Arnold.

Nothing, I think, is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are *to be considered as extinguished or as kept alive for [*19] his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot. Here, I think, the intention appears plainly on the face of the deed by which Miss Arnold purported

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to transfer her mortgage. There is no release of the debt. Payment is not acknowledged simply. But the debt is assigned. The mortgage is transferred. The power of sale and other powers are kept alive. To put it shortly, it is a transfer and not a reconveyance.

If it were necessary to look at the circumstances attending the transaction, it seems to me that the dealings with the bank and the negotiations with Cann which began before Miss Arnold was paid show the intention clearly enough. These dealings and transactions would have been simply a fraud on the part of Searle if it had not been his intention to keep the charge alive.

Moreover, if it were necessary to consider the point, it was plainly for the benefit of Searle to keep Miss Arnold's mortgage on foot. On these broad grounds, without considering any special equity to which Mr. Cann may be entitled, I think the decision of ROMER, J., affirmed by the Court of Appeal, is quite right, and I am of opinion that the appeal should be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, 19th November, 1894.

ENGLISH NOTES.

Formerly, different rules prevailed at law and in equity as to merger, so that there might be merger at law but not in equity, or conversely in equity but not at law. See *Forbes v. Moffatt* (1811), 18 Ves. 384, 11 R. R. 222; *Bulkeley v. Hope* (1855), 1 K. & J. 482. By the Judicature Act, 1873 (36 & 37 Vict., c. 66, s. 25, sub-s. 4), it is enacted that there shall not, after the commencement of the Act, be any merger, by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

The general rule of equity as laid down in *Hood v. Phillips*, *supra*, is that the question of merger or no merger depends upon intention either expressly declared or to be presumed from a consideration of all the circumstances of the particular case.

In the absence of any indication of contrary intention it is well settled that where a mortgagor entitled to the equity of redemption in fee simple pays off or otherwise acquires a mortgage or charge upon the fee, then if it is indifferent to his interests as to whether the mortgage should be kept on foot or not for the benefit of his personal estate a

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presumption arises that the mortgage is merged in the inheritance and extinguished. *Lord Compton v. Oxenden* (1793), 4 Bro. C. C. 396; *Lord Selsey v. Lord Lake* (1839), 1 Beav. 146; and the same will apply in the case of a mortgagor who is absolutely entitled to the equity of redemption in a term of years. *Smith v. Phillips* (1837), 1 Keen, 694. But irrespective of implication from acts of the mortgagor the presumption may be rebutted by showing greater advantage to the mortgagor's estate by holding that the mortgage has not merged. *Forbes v. Moffatt*, *supra*; *Hatch v. Skelton* (1855), 20 Beav. 453.

This presumption does not arise where a mortgage is paid off by the owner of a defeasible fee. *Drinkwater v. Combe* (1825), 2 Sim. & St. 340, 25 R. R. 210.

A similar presumption will arise where a mortgage and the equity of redemption become united in an adult tenant in tail in possession on the ground that he can at his pleasure convert his estate tail into a fee simple, and that if he omits to do so he intends the inheritance to have the benefit of the merger. *Jones v. Morgan* (1783), 1 Bro. C. C. 206, 217; *Kirkham v. Smith* (1747), 1 Ves. Sen. 257; *St. Paul v. Dudley* (1808), 15 Ves. 167, 10 R. R. 57; *Smith v. Frederick* (1826), 1 Russ. 174, 208; *Horton v. Smith* (1858), 4 K. & J. 624, 627. See *Drinkwater v. Combe*, *supra*.

No merger will be presumed, inasmuch as the ground for the presumption does not arise, where the tenant in tail acquiring the charge is entitled in remainder. *Wigsell v. Wigsell* (1825), 2 Sim. & St. 364, 25 R. R. 224; *Horton v. Smith*, *supra*. Nor for the same reason will the presumption arise where the tenant in tail is in possession but is an infant. *Thomas v. Kemys* (1697), 2 Vern. 348; *Smith v. Frederick*, *supra*. Nor where he holds by gifts from the Crown and is restrained from barring the entail. *Countess of Shrewsbury v. Earl of Shrewsbury* (1790), 1 Ves. Jr. 227, 2 R. R. 101.

Where a tenant for life pays off or otherwise acquires a mortgage on the fee, there is a strong presumption against merger, for it cannot be supposed to have been his intention to benefit the remainderman, who may be of distant kin or a stranger, at the expense of his own personal estate. *Jones v. Morgan*, *supra*; *Faulkner v. Daniel* (1843), 3 Hare. 199; *Jameson v. Stein* (1855), 21 Beav. 5. But this presumption may be rebutted by evidence of contrary intention. *Earl of Buckinghamshire v. Hobart* (1818), 3 Swanst. 186, 19 R. R. 197. See *Re Harvey*, *Harvey v. Hobday* (C. A. 1895), 1896, 1 Ch. 137, 65 L. J. Ch. 370, 73 L. T. 613, 44 W. R. 242.

On the same principle a mortgagee becomes entitled, by purchase or otherwise, to the equity of redemption in the property, subject to the mortgage, for an estate of inheritance, and if it is indifferent to his

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interests whether the charge should or should not be treated as continuing, a presumption will arise at his death that the charge was merged in the inheritance and extinguished. *Allen v. Aldridge* (1842), 6 Jur. 183; *Swinfen v. Swinfen* (1860), 29 Beav. 199.

Where a presumption of merger arises by reason of the union in the same person of a charge and of an estate of inheritance in the property charged, such presumption may be rebutted by a declaration that the charge shall be kept on foot for the benefit of his personal estate. *Bailey v. Richardson* (1852), 9 Hare. 734; *Jameson v. Stein*, *supra*; or by clear expressions of such intention in the conveyance; *Phillips v. Gutteridge* (1859), 4 DeG. & J. 531; or by an act on the part of the person in whom the charge and estate have become united indicating an intention that the charge shall be kept alive. *Jones v. Morgan*, *supra*; *Lord Compton v. Orenden*, *supra*; *Tyler v. Lake* (1832), 4 Sim. 53.

Correspondence at the time, or other parol evidence of conduct and dealings relating to the property, are admissible to explain the intention; and the evidence may be either direct or presumptive. *Hood v. Phillips*, *supra*; see *Astley v. Milles* (1827), 1 Sim. 298, 341, 27 R. R. 190; *Adams v. Angell* (C. A. 1877), 5 Ch. D. 634, 46 L. J. Ch. 352, 36 L. T. 334.

Where the owner of an equity of redemption pays off or acquires the first of several successive incumbrances care should be taken to keep alive the paramount incumbrance; for unless the intention to keep the charge on foot is indicated by apt words of conveyance or declaration, or is to be clearly implied from conduct and circumstances of the case, the Court cannot give relief so as to entitle the person paying off the charge to the benefit of it as against the subsequent incumbrancers. *Parry v. Wright* (1828), 5 Russ. 142; *Searle v. Colt* (1841), 1 Y. & C. C. C. 36. Similarly, if a first mortgagee purchases the equity of redemption with notice of a second mortgage, the second mortgage will become the first charge on the estate. *Greswold v. Marsham*, 2 Ch. Cas. 170; *Parry v. Wright*, *supra*; *Mackenzie v. Gordon* (1839), 6 Cl. & Fin. 875.

It was formerly thought that the purchaser of an equity of redemption could not by any means set up a prior mortgage of his own nor a prior mortgage which he had acquired as against subsequent incumbrances of which he had notice. *Toulmin v. Steere* (1817), 3 Mer. 210, 17 R. R. 67. But the principal case of *Thorn v. Cann*, *supra*, clearly shows that the principle of *Toulmin v. Steere* will not be extended, and that the intention of the purchaser of an equity of redemption who is also prior mortgagee to keep the charge alive, will, if sufficiently indicated, be carried into effect. See also *Stevens v. Mid-Hants Railway Co.* (1873), 1 L. R. 8 Ch. 1061, 42 L. J. Ch. 694, 29 L. T. 318, 21 W. R. 858.

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Merger of a different kind has been said to occur where the creditor holding for a debt takes a security by way of parol deposit for a debt, subsequently takes a formal instrument in writing by way of security over the same subject for a sum stated to be due to him. If the sum so stated omits the sum (or part of the sum) secured under the parol agreement, the possession under the formal instrument has been said to merge the possession under the parol agreement, and the original debt so omitted to be stated is unsecured. *Vaughan v. Vanderstegen* (1854), 2 Drew. 289.

On a somewhat similar principle a simple contract debt will merge if the debtor gives a bond or is sued to judgment. *Drake v. Mitchell* (1803), 3 East, 251, 7 R. R. 449. So also if the debtor gives a mortgage or equitable charge on property for the debt. *Saunders v. Milsome* (1866), L. R. 2 Eq. 573, 14 L. T. 788, 15 W. R. 2.

But the debt (whether simple or secured) does not merge if the subsequent security is taken for other matters as well as the original debt. *Norfolk Railway Co. v. Macnamara* (1849), 3 Ex. 628; *Holmes v. Bell* (1841), 3 Man. & Gr. 213. So also where a creditor having charge for a sum of money owing to him, and having also other sums owing to him not secured, takes a subsequent security for the whole amount owing. *Milne v. Walton* (1843), 2 Y. & C. C. 354.

AMERICAN NOTES.

Hood v. Phillips is cited in 1 Jones on Mortgages, sect. 857, and *Burrell v. Earl of Egremont*, at 2, sect. 1198. See *ante*, vol. 17, "Merger," p. 380-392.

Jones says (1 Mortgages, sect. 857): "When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself. Therefore if the estate be subject to other incumbrances, which he is under no obligation to pay, and it is better for him to preserve the lien of the prior mortgage rather than to extinguish it and let the next subsequent incumbrance into its place of priority, these facts may be taken as sufficient ground for inferring that his intention was to preserve the mortgage rather than to extinguish it:" citing *Factors & Traders' Ins. Co. v. Murphy*, 111 United States, 738; *Jackson v. Relf*, 26 Florida, 465; *Denzler v. O'Keefe*, 34 New Jersey Eq. 361; see also *Loud v. Lane*, 8 Metcalf (Mass.), 517; *Clark v. Clark*, 56 New Hampshire, 105; *Campbell v. Carter*, 14 Illinois, 286; *Armstrong v. McAlpin*, 18 Ohio St. 184; *Moore v. Harrisburg Bank*, 8 Watts (Penn.). 138; *Gardner v. Astor*, 3 Johnson Chancery (N. Y.), 53; 8 Am. Dec. 465; and see a long list of authorities to the same purport, 1 Jones on Mortgages, sect. 848. The doctrine is very well established by these authorities, many of which cite and rely on *Forbes v. Moffatt*, 18 Ves. 384.

If the interest of a mortgage is bequeathed to one for life, and the principal to the mortgagor afterwards, the mortgage is kept alive, and may be foreclosed during the lifetime of the person entitled to the interest. *Hancock v. Hancock*, 22 New York, 568.

Nos. 63, 64. — **Harrison v. Owen**; **Cowper v. Green.** — **Rule.**

No. 63. — **HARRISON v. OWEN.**

(1738.)

No. 64. — **COWPER v. GREEN.**

(1841.)

RULE.

AN effectual release of a debt, whether express or implied from conduct, discharges all securities for the same, whether original or collateral in the hands of the creditor; but re-conveyance is necessary to revest the legal estate in the mortgagor.

Harrison v. Owen.

1 Atk. 520.

Mortgage. — Cancellation. — Presumption.

[520] If a mortgage is found cancelled in the possession of mortgagee, it is as much a release as cancelling a bond.

This cause went off to an issue, to try whether certain mortgages were fairly cancelled by the mortgagee, or whether they were fraudulently and by stealth carried away by the mortgagor, and the seals cut off by him.

LORD CHANCELLOR said in this cause, that if a mortgagee cancels a mortgage, and it is found so in his possession, it is as much a release as cancelling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed.

Cowper v. Green.

7 Meeson & Welsby, 633-641.

Release of Debt. — Security Extinguished.

[633] By the release of a debt by a composition deed, the creditor loses also the right to retain a written instrument deposited with him by the debtor as a security for the debt. Therefore, the relinquishment of such security, for the benefit of the debtor, forms no consideration for a parol promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed.

Assumpsit. The first count of the declaration stated, that before the making of the promise and undertaking of the defendant

thereinafter mentioned, and before the making of the indenture of assignment thereinafter also mentioned, the defendant had become and was indebted to the plaintiffs in the sum of £440 0s. 5*d.*, and as a security for the payment thereof had deposited with the plaintiffs a certain indenture of lease, whereby a certain messuage and premises, with the appurtenances, situate, &c., was demised to the defendant for a certain term of years therein mentioned, and had also indorsed and delivered to the plaintiffs certain bills of exchange (describing them), of which those firstly and secondly mentioned, at the time of the making of the said promise thereinafter mentioned, had been dishonoured, and then remained due and unpaid in the hands of the plaintiffs: and whereas also, after the defendant had so become indebted to the plaintiffs as aforesaid, and before the making the promise by the defendant as thereinafter mentioned, to wit, on the 18th day of June, 1836, by a certain indenture then made between the defendant of the first part, John Bradbury and Augustus Cherrill of the second part, and the plaintiffs and other the creditors of the defendant who should duly execute the same of the third part, purporting to be an assignment of the estate and effects of the defendant to the said J. Bradbury and A. Cherrill for the benefit of the creditors of the defendant, the defendant assigned to the said J. Bradbury and A. Cherrill all his stock in trade and other personal estate whatsoever, upon trust, among other things, to pay the clear proceeds arising from the sale *thereof unto and amongst all the [*634] creditors of the defendant, in rateable proportions according to the amount of their respective debts; in consideration whereof, the plaintiffs, parties to the said indenture, did release and discharge the defendant of and from his said debt: and whereas also, before the making of the promise of the defendant as thereinafter mentioned, the plaintiffs had duly executed the said indenture of assignment, as parties thereto of the third part: and whereas also, heretofore, and before, &c., to wit, on the 1st day of August, 1836, the defendant applied to and requested the plaintiffs to relinquish and give up to Messrs. J. & C. Ling & Co., of, &c., but for the benefit and advantage of the defendant, all right, estate, claim, and advantage whatsoever of them the plaintiffs in and to the said messuage and premises, which the plaintiffs then consented to do in consideration of the promise of the defendant thereinafter mentioned: and thereupon afterwards, to wit, on, &c., in considera-

tion that the plaintiffs, at the request of the defendant, would relinquish and give up all the estate and interest that they had in the said lease of the messuage and premises aforesaid, in favour of the said Messrs. J. & C. Ling, for the benefit and advantage of the defendant, the defendant undertook and then promised the plaintiffs to pay them any deficiency that might arise to them upon his, the defendant's, aforesaid debt, after they should have received the dividend of his estate under his aforesaid assignment for the benefit of his creditors and such other sums as they might receive for the securities they might hold. The declaration then averred, that the plaintiffs, confiding, &c., did relinquish and give up all the estate and interest which they had in the lease in favour of Messrs. Ling, whereof the defendant had notice; and that under the assignment, and upon the securities which the plaintiffs held, to wit, the aforesaid bills of exchange, they have received [*635] certain sums of money amounting to * £279 12s. 4*d.*, and that no further dividend is payable or to be paid under the said assignment, or upon the aforesaid securities, of all which the defendant had notice: and assigned a breach in non-payment by the defendant of the balance remaining due upon the plaintiffs' debt, viz. £160 8s. 1*d.* There was also a count on an account stated.

The defendant pleaded non-assumpsit, and several other pleas, of which the fourth (to the first count) was as follows: That there never was at any time any value or consideration between the plaintiffs and the defendant moving in that behalf, nor did the plaintiffs ever give, or the defendant ever receive, any value or consideration for the making by the defendant of the said supposed promise in the first count mentioned, except the supposed consideration in the said first count mentioned. And the defendant further says, that after the depositing by the defendant with the plaintiffs of the said indenture of lease in the declaration mentioned, as a security for the repayment by the defendant to the plaintiffs of the said debt of £440 0s. 5*d.*, and whilst the same was then due and payable to the plaintiffs, and before the supposed consideration for the making of the defendant's promise in the first count mentioned, and whilst the said indenture of lease was in the hands of the plaintiffs as aforesaid, and before the commencement of this suit, to wit, on the said 18th day of June, 1836, the plaintiffs, by a certain indenture sealed with their respective

No. 64. — *Cowper v. Green*, 7 Mees. & Wels. 635, 636.

seals, and now shown to the Court here, for the considerations therein mentioned, did thereby acquit, release, and forever discharge the defendant of and from all manner of debt and debts, sum and sums of money, bills, bonds, notes, accounts, reckonings, judgments, executions, action and actions, suit and suits, claims, demands, costs, charges, damages, and expenses whatsoever, which they the plaintiffs, or either of them, their or either of their partner or partners, then had or ever had, or could, should, or might at any time hereafter have, claim, *challenge, or demand of, [*636] from, or against the defendant, his executors or administrators, or his, their, or either of their lands or tenements, goods or chattels, from the beginning of this world to the day of the date of the last-mentioned indenture; as by the said last-mentioned indenture, reference being thereunto had, will more fully appear. And the defendant further saith, that the said debt of £440 0s. 5d. was (amongst others) then released by the plaintiffs to the defendant in manner and form as above mentioned. Verification.

Special demurrer, assigning for causes, that the defendant, in the said plea, neither denies the making of the promise by him as the plaintiffs have in the first count alleged, nor alleges any matter in confession and accordance thereof; neither does the defendant allege any matter whereupon the plaintiffs can take a certain and positive issue: that the defendant, in the said plea, attempts argumentatively to put in issue the legality and sufficiency of the consideration upon which the defendant made the promise in the first count alleged: that although the defendant, in the said plea, hath alleged that the plaintiffs, in and by the said indenture of the 18th of June, 1836, released the defendant of and from all and all manner of debts and demands due from the defendant to the plaintiffs, and that the debt so due as in the first count mentioned was thereby released, yet the defendant hath not alleged that the plaintiffs, by the said indenture, released the interest which they had acquired in the said indenture of lease, by the same having been deposited with them by the defendant as in the first count alleged; and that the defendant, in the said plea, attempts to show argumentatively that the said indenture of the 18th of June, 1836, operated as a release of the interest that the plaintiffs had acquired by the deposit of the said indenture of lease with them by the defendant, as in the first count alleged. Joinder in demurrer.

[* 637] * The following points were marked for argument on the part of the defendant: 1. That the declaration is bad as disclosing a fraudulent transaction, by which the plaintiffs, after receiving the full dividend on their debt by virtue of the composition deed, were to secure a further advantage to themselves, by being paid in full, to the prejudice of the general body of the defendant's creditors. 2. That the declaration discloses no consideration for the defendant's promise, inasmuch as it is stated in the declaration that the plaintiffs released the debt for which they held the lease, and then all right of holding it on the part of the plaintiffs was gone. 3. That there also is no consideration for the said promise, on the ground that the plaintiffs were paid in full, in contemplation of law, by receiving the said dividend, all claim which they had on the said lease.

The case was argued on a former day (Jan. 25) by

Humfrey in support of the demurrer. — First, the declaration is good. It does not appear that the agreement between the plaintiffs and the defendant was in fraud of the other creditors. If the creditors were made aware of it, it was good in law. There might be a good consideration for the creditors permitting another to receive more in proportion than they.

Secondly, the plea is bad. No issue can be taken upon it. What could the plaintiff reply to it? The deed stated in the plea is the very deed set out in the declaration. The plaintiff could not say there is no such deed, for he has averred it in his declaration, as part of the consideration in respect of which he sues. Suppose he took issue on the averment that there was no consideration for the defendant's promise except the supposed consideration mentioned in the declaration: that would be a wholly immaterial issue.

[PARKE, B. — The question arises upon the declaration; [* 638] * the plea does no more than repeat at greater length the allegation of a release in the declaration.]

Erle, *contra*. — The question in this case is, whether, a debtor having deposited with a creditor a deed as a security for his debt, and having afterwards compounded with that and other creditors, the payment of such composition is not a consideration for the giving up of the deed by the creditor. The promise alleged in the declaration is, that the defendant will pay the plaintiffs the remainder of their debt, beyond what they have received under the composition deed. Where is the consideration for that promise?

What right had the plaintiffs to retain these securities for their debt, after an absolute release by them of the debt itself? The debt is released *in toto*, for good consideration, viz., the payment of the composition stipulated for in the deed. [PARKE, B. — No doubt, if there has been actual satisfaction, the plaintiffs' claim is altogether at an end: the question is, whether a release has the same effect.] A release is just as operative to destroy the debt as satisfaction. [PARKE, B. — To make the declaration bad, you must say that all right and title to the possession of the securities is gone by the composition; and that the debtor could have recovered them *in trover*.] It is submitted that he could. If the debt had been paid, it must be conceded that he could; and if it be released for value received from a third party, is it not the same? The debt is released and gone, therefore the creditor's qualified right to hold the deed as a security for it, is gone also. Is it less so, because the consideration is a composition, which is not a satisfaction to the full amount? The legal effect of the release cannot depend on the amount of the consideration. It was possible that under the deed of composition the whole debt might have been paid; how, then, could the effect of the absolute release contained in the deed depend on the amount which is ultimately realised afterwards? * Suppose a third party had given security for the [* 639] debt; if the creditor released to the principal debtor, and did not obtain his full debt, could he still hold the surety liable? There are, indeed, cases, running near the present, where a creditor has been allowed to resort to securities remaining in his hands, notwithstanding a release in a composition deed; but that is where he has specially reserved the right to do so, as in *Duffy v. Orr*, 5 Bligh (N. S.), 620; 1 Cl. & Fin. 253, where the creditor added to his signature to the composition deed the words, "without prejudice to any securities whatever that I hold;" and the other creditors signed it afterwards. But the effect of a legal instrument cannot be altered by the mere understanding of the parties.

But further, the agreement for full payment of the plaintiffs' debt was a fraud on the other creditors parties to the composition deed, and therefore could not form any consideration. *Lewis v. Jones*, 4 B. & C. 506 (28 R. R. 360). There are cases where a subsequent promise or security has been sued on, but that is where it has been under seal; a subsequent promise, not under seal, to pay the remainder of the debt, is *nudum pactum*. *Ex parte Hall*, 1 Deac. B. C. 171.

Humfrey, in reply. — The question is, whether the agreement contained in the composition deed is such as bound the plaintiffs to give up the securities they at that time held for their debt. The plaintiffs had a right to retain them in order to reduce their debt. If they could, by selling the lease, reduce the amount of their debt, they had a right to do so. *Thomas v. Courtney*, 1 B. & Ald. 1, is an authority for the plaintiffs. There the creditors of an insolvent agreed, by an instrument not under seal, to accept in full satisfaction of their debts 12s. in the pound payable by instalments, and to release him from all demands. One of [*640] * the creditors who signed for the whole amount of his debt,

held at the time, as a security for part, a bill of exchange drawn by the debtor and accepted by a third person; and the money due thereon was afterwards paid by the acceptor. It was held that the creditor might retain the bill, the agreement for composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. It must be contended on the other side, that the instant the composition deed was signed, every security held by the plaintiffs could have been recovered by the defendant in an action of trover. It would be for the benefit of the creditors generally, that the plaintiffs should reduce their debt by means of this security, which was not intended to be given up, and therefore they have a right to retain it. [Lord ABINGER, C. B. — In *Thomas v. Courtney*, the Court thought there was no release of the debt itself.] *Cur. ad. vult.*

The judgment of the Court was delivered on the 30th of January by

PARKE, B. — The declaration in this case states, that in consideration that the plaintiffs would deliver up a lease held by them as a security for a debt due to them by the defendant, and from which it is contended the defendant had previously been released by force of a composition deed executed by the plaintiffs, he promised to pay them the balance of their debt, which should remain due after the stipulated dividend had been paid, and should not have been previously realised by other securities. To this the defendant pleaded a plea setting out the composition deed, and describing it as a general release of all debts whatever due from him to the plaintiffs from the beginning of the world to the date of the instrument: and the objection made in the case arises on the

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declaration, * namely, that by force of that deed the plain- [* 641]
 tiffs' debt having been previously released, they were no
 longer entitled to hold the indenture of lease as a deposit to secure
 repayment, and consequently that their giving up the latter could
 form no consideration for a promise by the defendant to pay the
 balance due on that debt. On looking into the authorities, we find
 that the law is so. In *Shep. Touch.* p. 342, it is thus laid down :
 " By a release of all debts, are discharged and released all debts
 then owing from the releasee to the releasor upon specialties or
 otherwise, all debts also due upon statutes. And therefore if the
 conusor himself, or his land, be in execution for the debt, and he
 hath such a release, he must be discharged." And Mr. Preston adds :
 " For, by releasing the debt, the security for the debt is released."
 That authority is precisely in point. Here is a release of the debt,
 the consequence of which is, that the party releasing has no right
 to hold the collateral security which was deposited with him ; for,
 looking at the form of the release, it must not be understood simply
 to release the right of action on the debt, but the security also.
 The debt is released, and consequently as much gone in point of
 law as if it had been satisfied ; and as the plaintiffs had no right
 to hold the security for it afterwards, so they had no right to make
 the giving up of that security the consideration of a promise by
 the defendant, and consequently the present action cannot be
 maintained. The judgment must therefore be for the defendant.

Judgment for the defendant.

ENGLISH NOTES.

An effectual release of a mortgage debt discharges and extinguishes
 the mortgage and all collateral securities for the debt. *Cowper v.*
Green, *supra*.

A release of a debt may be given either expressly or may be implied
 from conduct or circumstances indicating such intention on the part of
 the mortgagee. If the mortgage is made by deed a release of the debt
 without consideration will not be binding on the mortgagee at law,
 unless made by deed. *Hanson on Contracts*, p. 314 ; see *Re Hancock.*
Hancock v. Berry (1888), 57 L. J. Ch. 793. But in equity the conduct
 of the parties or the circumstances of the case may raise a presumption
 of an intention to discharge the security which will be carried
 into effect. See *Yeomans v. Williams* (1865), L. R. 1 Eq. 184, 35 L.
 J. Ch. 283 ; *Taylor v. Manners* (1865), L. R. 1 Ch. 48, 35 L. J. Ch.
 128, 13 L. T. 388, 14 W. R. 154.

The cancellation of a mortgage which is in the possession of the mortgagee is *prima facie* evidence of intention to release the debt and discharge the security. *Harrison v. Owen, supra*; *Gunner v. Adams* (1844), 13 L. J. Ex. 40.

A mortgage may also be discharged and extinguished by a release of the property comprised in the mortgage.

Though a legal mortgage will be discharged either by a release of the debt or of the mortgage property, yet the legal estate cannot generally be re-vested in the mortgagee except by a formal deed of reconveyance. *Harrison v. Owen, supra*; *Weeks v. Stourton* (1865), 11 Jur. (N. S.), 278.

To this rule there are certain statutory exceptions.

In the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict., c. 18), ss. 108, 109, special provisions are contained for redeeming mortgages affecting lands purchased under the powers of the Act, which enable the company purchasing, on refusal of the mortgagee to convey, or on his default in making a good title, to pay the money into Court, and execute to themselves a deed poll, which is to operate as a conveyance.

In the case of a mortgage to a building society, or to a friendly society, no reconveyance or surrender is necessary, as a receipt in the form prescribed by statute, indorsed on or annexed to the mortgage deed, is sufficient to vest the mortgage property in the person for the time being entitled to the equity of redemption. 37 & 38 Vict., c. 42, s. 42; 38 & 39 Vict., c. 60, s. 16. See *Fourth City Mutual Benefit Building Society v. Williams* (1879), 14 Ch. D. 146, 49 L. J. Ch. 245, 42 L. T. 615, 28 W. R. 572.

A registered charge on land under the Land Transfer Act, 1875, is discharged by cancelling the original entry on the register. 38 & 39 Vict., c. 87, s. 28.

As to the discharge of mortgages of land in Ireland, see 28 & 29 Vict., c. 88, s. 44; 54 & 55 Vict., c. 66.

Property comprised in a merely equitable charge is effectually released without reconveyance by a receipt in writing for the money due on the mortgage; so where the mortgaged property is copyhold to which the mortgagee has not been admitted, it is sufficient to enter up satisfaction on the Court rolls. 1 Watk. Cop. 4 ed. p. 148. See *Bargaine v. Spurling*, Cro. Car. 283.

On being actually paid off the amount owing on a legal mortgage, but not before, the mortgagee is bound to reconvey the mortgaged property to the mortgagor or those deriving title under him. *Coe v. Cuffin* (1724), 9 Mod. 120; *Lacey v. Wagborne* (1887), 59 L. T. 208. The mortgagee is estopped from denying the mortgagor's title. *Tasker v. Small* (1837), 3 My. & Cr. 63, 70.

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After long lapse of time a conveyance of the legal estate will be presumed. *Cooke v. Soltan* (1824), 2 Sim. & St. 154.

On redemption the mortgagee must, as a general rule, deliver to the mortgagor all title deeds and documents relating to the mortgaged property. *Hudson v. Malcolm* (1862), 10 W. R. 720; *Re Wade and Thomas* (1881), 17 Ch. D. 348, 50 L. J. Ch. 601, 44 L. T. 599, 29 W. R. 625.

As to the right of a mortgagor to require the mortgagee, instead of reconveying, to assign the mortgage debt, and convey the mortgaged property to any person as the mortgagor directs, see 44 & 45 Vict., c. 41, s. 15; 45 & 46 Vict., c. 39, s. 12.

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Washburn (2 Real Property, p. 526), cites the first principal case, and he sums up the American doctrine as follows: "Somewhat analogous to the question how a mortgagee's interest may be assigned, is that as to how, when he shall have once gained possession of the premises, he may be divested of his legal seisin and estate. If this possession is gained before the condition of the mortgage is broken, the payment, cancelling, or discharging of the debt, before that has happened, defeats the estate of the mortgagee altogether, without any act on his part. And this, it is believed, is universally applicable to this country, as well as in England. The effect of a payment or cancelling of the debt after condition broken is different in different States, and in the same State under different circumstances. Thus, in Massachusetts and Maine, for instance, if the mortgagee sues to enforce his mortgage, and declares upon it as such, he can only have a judgment for possession after so many days, if the mortgagor fails before that time to pay a liquidated sum, being the amount due; so that if the debt has really been paid, it operates as an effectual discharge of the mortgage, since it can no longer be enforced. *Baker v. Gavitt*, 128 Massachusetts, 93; *Williams v. Thurlow*, 31 Maine, 392. And the same effect, though in somewhat different form, would be produced by a like payment or discharge in Pennsylvania and Maryland. *Craft v. Webster*, 4 Rawle, 242, 253; *Pacon v. Paul*, 3 Harris & McHenry, 399. So in New Jersey. *Shields v. Lozcar*, 34 N. J. Law, 496, 504. But if the mortgagee shall have obtained possession by judgment or otherwise for condition broken, and the debt is satisfied while he is so in possession, the mortgagor is not remitted to his legal seisin and estate, nor is the seisin and estate of the mortgagee defeated. The mortgagor's remedy in such a case is by a bill in equity; and if he enters upon the mortgagee without a proper decree, he may be treated as a trespasser. *Wilson v. Ring*, 40 Maine, 116; *Howe v. Lewis*, 14 Pickering, 329. So in Connecticut, Virginia, and Mississippi. *Smith v. Vincent*, 15 Connecticut, 1; *Faulkner v. Brockenborough*, 4 Randolph, 245; *Wolfe v. Dowell*, 13 Smeedes & Marshall, 103. It would be otherwise, however, if the mortgagee were to take possession after his debt had been satisfied. *Sibley v. Rider*, 51 Maine, 463; *Baker v. Gavitt*, 128 Massachusetts, 93. Accordingly, in England, Massachusetts, and Maine, it requires a deed of conveyance or release in such

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a case to divest the mortgagee of his seisin and estate, and a tender of the debt after condition broken will not have the effect to discharge the mortgage: *Currier v. Gale*, 9 Allen, 522; *Mitchell v. Burnham*, 44 Maine, 286; while in New York, New Jersey, and Kentucky, no such deed is requisite. *Fay v. Cheney*, 14 Pickering, 399; *Den v. Spinning*, 1 Halstead (6 N. J. L.), 71; *Shields v. Loeear*, 22 N. J. Eq. 177; *Armitage v. Wickliffe*, 12 B. Monroe, 188. And in Illinois, in the mortgagee have entered for condition broken, and the debt be paid, the mortgagor may have ejectment against him to recover possession of the premises. *Holt v. Rees*, 44 Illinois, 36. But in those States where a transfer or extinguishment of the debt is a transfer or extinguishment of the mortgage estate, a payment or a voluntary forgiving of the debt has the same effect, even if done after condition broken. *Hawkins v. King*, 2 A. K. Marshall (Kentucky), 108; *Craft v. Webster*, 4 Rawle (Penn.), 253; *Jackson v. Bronson*, 19 Johnson (N. Y.), 325; *Paron v. Paul*, 3 Harris & McHenry (Maryland), 399; *Berry v. Derwart*, 55 Maryland, 66, 73; *Perkins v. Dibble*, 10 Ohio, 133; *McMillan v. Richards*, 9 California, 365; *Fisher v. Otis*, 3 Chandler (Wis.), 83; *Ludue v. Detroit, &c. R. Co.*, 13 Michigan, 380, 396; *Ryan v. Dunlap*, 17 Illinois, 40; *Sherman v. Sherman*, 3 Indiana, 337. So where a mortgage was assigned to several, an aliquot part of the debt to each, the payment of the share of any one of these extinguishes his interest in the mortgage. *Furbush v. Goodwin*, 25 New Hampshire, 425; *Burnett v. Pratt*, 22 Pickering (Mass.), 556. So a payment of the mortgage-debt rescinds the power of sale which may have been contained in the mortgage-deed. *Cameron v. Irwin*, 5 Hill (N. Y.), 272; and a tender of the debt, after the day of payment, bars the right to recover the land under the mortgage. *Trimm v. Marsh*, 54 New York, 599."

Kent says (4 Com. 193), after citing *Harrison v. Owen*: "The general understanding, and the practice on this subject, in this country, have been different, though the cases are not uniform. This contrariety of opinion, which shows itself here and in England, proceeds from the vibration between law and equity views of the subject. A judge at law, as was observed in *Gray v. Jenks* (3 Mason U. S. Circ. Ct., 521), sometimes deals with the mortgage in its most enlarged and liberal character, stripped of its technical habiliments; and a Judge in equity sometimes follows out the doctrine of law, and contemplates it with much of its original and ancient strictness. The debt, generally speaking, is considered to be the principal, and the land only the incident; and discharging or forgiving the debt, with the delivery of the security, any time before foreclosure, extinguishes the mortgage, and no reconveyance is necessary to restore the title to the mortgagor. (*Farmers' F. Ins. & L. Co. v. Edwards*, 26 Wendell (N. Y.), 541.) So an assignment of the debt by deed, by writing simply, or by parol, is said to draw the land after it as a consequence, and as being appurtenant to the debt. The one is regarded as the principal, and the other as accessory, and *omne principale trahit ad se accessorium*. The assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use. This is the general language of the Courts of law, as well as of the Courts of equity; and the common sense of parties, the spirit of the mortgage contract, and the reason and policy of the thing, would seem to be with that doctrine." (Citing

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among others *Martin v. Mowlin*, 2 Burr. 978; *Johnson v. Hart*, 3 Johnson Cases [2 N. Y.], 322; *Wentz v. Dehaven*, 1 Sergeant & Rawle [Penn.], 312; *Den v. Spinning*, 1 Halsted (New Jersey), 471; *Morgan v. Davis*, 2 Harris & McHenry (Maryland), 17; *Hatch v. White*, 2 Gallison (U. S. Circ. Ct.), 155, by STORY, J.; *Paine v. French*, 4 Ohio, 320; *Ellison v. Daniels*, 11 New Hampshire, 274.) In Massachusetts and Maine the technical rules of the common law are more strictly maintained. The doctrine of Lord MANSFIELD, in *Martin v. Mowlin*, is not regarded as correct; and upon the construction of their statute law, the estate of the mortgagee cannot be assigned except by deed; though a bond may be assigned, and pass without deed, and even by delivery. Upon the discharge of the mortgage debt, after a default, a reconveyance is deemed requisite to restore the fee to the mortgagor. This is the doctrine also in Connecticut, Virginia, and Kentucky. (Citing Judge TROWBRIDGE's opinion, 8 Massachusetts, 554; *Warden v. Adams*, 15 Massachusetts, 233; *Prescott v. Ellingwood*, 23 Maine, 345; *Phelps v. Sage*, 2 Day (Connecticut), 151; *Faulkner v. Brockenborough*, 4 Randolph (Virginia), 245; *Breckenridge v. Brooks*, 2 Marshall (Kentucky), 337; 12 Am. Dec. 401.)

In a note the commentator adds: "In *Gray v. Jenks*, 3 Mason, 520, a satisfied mortgage under the law of the State of Maine was so far deemed an extinguished title, as that no action would lie upon it by the mortgagee. The irresistible good sense and equity of such a conclusion was felt and forcibly expressed by the learned Judge who decided that case; and an intimation to the same effect had been previously given by the Chief Justice of Maine, in the case of *Vose v. Handly*, 2 Greenleaf, 322; 11 Am. Dec. 101. It may therefore be presumed, notwithstanding the language of other parts of that case, that the doctrine stated in the text will yield to the more liberal views of the subject implied in the emphatical suggestion of the Chief Justice. The opinions of Judge TROWBRIDGE are cited with the greatest respect in Massachusetts; and he is considered, and I presume very justly, as the oracle of the old real property law. He criticises, very ably, the opinion of Lord MANSFIELD; and some of the observations attributed to his lordship, in *Martin v. Mowlin*, were no doubt very loosely made. Judge TROWBRIDGE insists that Lord MANSFIELD confounds the distinction between mortgages of land for a term only, and a mortgage in fee. The former, he says, is but a chattel interest, and the latter an estate of inheritance, descendible as such, and the money due thereon is equitable assets. The Supreme Court of Massachusetts, in *Parsons v. Welles*, 17 Mass., 419, adhered to these views of the subject. But I would observe, with great submission and respect, that the doctrines of Judge TROWBRIDGE, on mortgages, was far in the rear of the improvements of the age, in this branch of the science; and it will not do to take our doctrines of mortgage from Littlejohn and Coke. The language of the Courts of law is now essentially the same as that in equity; and it is said, again and again, to be an affront to common sense to hold that the mortgagor, even of a freehold interest, is not the real owner. To show that many of the positions of Judge TROWBRIDGE are not law at this day, it is sufficient to state, that he maintains that the equity of redemption goes to the heir, and not to the executor of the mortgagee; that a third mortgagee, without notice, may buy in the first mortgage, and secure himself against the second; that the mort-

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gagee in fee has an interest which the creditor may take on execution. The cases of *Morgan v. Davis*, 2 Harris & McHenry (Maryland), 9. *Paxon v. Paul*, 3 ibid., 399. *Jackson v. Davis*, 18 Johnson (N. Y.), 7 and *Jackson v. Blodget*, 5 Cowen (N. Y.), 201, may be selected as cases in which it has been adjudged in the Courts of law, that on discharge of the mortgage, after a default, the fee reverts to, and vests in the mortgagor, without any conveyance; and I am persuaded that most of the Courts of law in this country would not now tolerate a claim of title under a mortgage, admitted or shown to have been fully and fairly satisfied by payment."

In *Cameron v. Irwin*, 5 Hill (N. Y.), 272, it was held that payment of a mortgage extinguishes the power of sale in it, and the whole title reverts in the mortgagor, as against a purchaser at a sale under a statutory foreclosure by advertisement.

In *Brost v. Brock*, 10 Wallace (U. S. Sup. Ct.), 519, A. D. 1870, it was held that "ejectment will not lie at the suit of a mortgagor against his mortgagee in possession, after breach of the condition, even if the money secured by the mortgage be paid or tendered" (citing Massachusetts cases), but the remedy is in equity. The Court said: "There is justice and fitness in holding that the legal title remains in the mortgagee until redemption, although the debt has been paid." "The point has never been decided by this Court, but in *Gray v. Jenks*, Judge STORY intimated at least that such was his opinion, though the case did not call for such a decision. It is true a different rule is said to prevail in New York from that held in Massachusetts, but it is not the rule of the common law, nor can it be so promotive of justice."

In *Smith v. Vincent*, 15 Connecticut, 1, it was held that the title of a mortgagee, under a mortgage satisfied after forfeiture, may be set up by one not a stranger as a defence to an action of ejectment. The Court said: "If we were to be governed by the authorities in the State of New York, or the opinion of the distinguished commentator, who so ably filled the Chancellor's seat, this would be correct. Kent's Commentaries, Part VI. lect. 58. But this question was settled by the Supreme Court of this State, after an able argument, in the case of *Phelps v. Sage*, 2 Day (Conn.), 151, in conformity to the well settled practice. The same decision has been made in the State of Massachusetts. *Parsons v. Welles & al.*, 17 Massachusetts Rep. 419. And whatever may be said of the more liberal practice of modern times, we think that it will much better comport with the policy of our laws that the parties should have this inducement to make our records show, as far as practicable, the real state of the title to real property. Ch. J. HOSMER treats it as a settled question. 5 Connecticut Reports, 136. And we had no intention of disturbing it, by the decision of *Porter v. Seeley*, 13 Connecticut Reports, 564. The Judge who gave the opinion in that case does indeed introduce the decision in the State of New York; but without advertent to the case of *Phelps v. Sage*, he sums up that case, by saying, that 'the attempt to bar the action by the title of the mortgagee is made by a stranger, who has no interest whatever, in the debt or land' (p. 576). So far the Court intended to go, and no farther. We would not permit a person without a shadow of title to protect himself by a satisfied mortgage. In doing this, however, the Court could not have intended to overrule a decision on this very point, which was not adverted to, on the trial. If the condition

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of this deed was not performed, we cannot see why the legal title does not remain in the mortgagee: and if equity would seem to require us to say, that the debt being paid, the object is accomplished, and so the title reverts, we should say in reply, that it is the policy of our law that our titles should appear upon our records; and we are not disposed to overturn decisions well calculated to subserve that object."

Without a formal satisfaction of the mortgage or some other course to vest the mortgagor with the legal title, such title, even after payment of the debt, does not revert in him. *Wolfe v. Dowell*, 13 Smedes & Marshall (Mississippi), 103; 51 Am. Dec. 147.

Unaccepted tender after default does not revert title. *Shields v. Lozeau*, *supra*; *Crain v. McGoon*, 86 Illinois, 431; 29 Am. Rep. 37; *Maynard v. Hunt*, 5 Pickering (Mass.), 240. But *contra*: *Kortright v. Cady*, 21 New York, 343; *Carruthers v. Humphrey*, 12 Michigan, 271.

Payment of a mortgage debt, whether before or after forfeiture, extinguishes the debt, and the title vests in the mortgagor or his vendee, without release or reconveyance. *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marshall (Kentucky), 236; 19 Am. Dec. 71; *Ryan v. Dunlap*, 17 Illinois, 40; 63 Am. Dec. 334; *McMillan v. Richards*, 9 California, 365; 70 Am. Dec. 655; *Perkins v. Sterne*, 23 Texas, 561; 76 Am. Dec. 72; *Mead v. York*, 6 New York, 449; 57 Am. Dec. 467; *Nichols v. Lee*, 10 Michigan, 526; 82 Am. Dec. 57; *Horstman v. Gerker*, 49 Penn. St. 282; 88 Am. Dec. 501; *Smith v. Durrell*, 16 New Hampshire, 344; 41 Am. Dec. 732; *Shields v. Lozeau*, 34 New Jersey Law, 496; 3 Am. Rep. 256; "The debt is the principal thing, and the mortgage a mere incident. The first is the substance, the latter its shadow. When the first is destroyed by payment, the latter vanishes. It cannot become the incident to another principal, nor the shadow of another substance;" citing *Ex parte Hooper*, 1 Meriv. 7.

Mr. Jones observes (1 Mortgages, sect. 889): "But while payment before condition broken reverts the title in the mortgagor, without reconveyance or other discharge, payment after condition broken does not divest the mortgagee of his legal title: and the mortgagor, if necessary, must resort to equity for a release or reconveyance. This is the doctrine of the common law, and generally prevails in those States where the common-law doctrine of the nature of mortgages has not been changed by statute" (citing late cases from Connecticut, Maine, and Massachusetts); "but in those States which have departed from the common law in this respect, it is held that acceptance of payment after condition broken is a waiver of the condition, and has the same effect as a performance of it. The mortgage being regarded, not as an estate in the land, but as merely a lien, the life of which depends altogether upon the debt, when this is paid, the lien is in fact discharged" (citing cases from California, Indiana, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York).

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MUNICIPAL CORPORATIONS ACT, 1882.

See "CORPORATION," Part I., Vol. VII. 180-379, *passim*.

MUSICAL COMPOSITION.

WOOD v. BOOSEY.

(Q. B. & EX. CH. 1867, 1868.)

RULE.

A NEW arrangement of a musical composition for interpretation of the melody and harmony by instruments different from those for which the music was originally composed (such as an arrangement of an orchestral score for the pianoforte) is a new and independent work, constituting a book of which the arranger is the author within the Copyright Acts, although the publication of such an arrangement without leave of the original author would be an infringement of his rights, if they are duly protected under the Acts.

Wood v. Boosey and another.

L. R. 2 Q. B. 340-357; L. R. 3 Q. B. 223-233 (s. c. 36 L. J. Q. B. 103; 37 L. J. Q. B. 84).

[340] *Copyright*. — *International Copyright Act* (7 Vict., c. 12), s. 6. — "*Author or Composer*." — *Arrangement for the Pianoforte of Score of an Opera*. — *Rights of Assignee*.

By sect. 6 of the International Copyright Act, 7 Vict., c. 12 (which incorporates the Copyright Amendment Act, 5 & 6 Vict., c. 45), no author of any musical composition first published in a foreign country shall be entitled to the benefit of the Act unless, within the time mentioned in the Order of Council applying to that country, the musical composition shall have been registered, with the following particulars: Title of the work, name and place of abode

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of the author or composer, time and place of the first publication in the foreign country.

N. composed and published an opera in full score at Berlin, and after his death B. arranged the score of the whole opera for the pianoforte, also the overture for the piano, and the whole opera *pour le piano seul*; in registering these arrangements in England, N.'s name was inserted as composer.

* *Held*, by judgment of the Queen's Bench, affirmed in the Exchequer [* 341] Chamber, that the arrangements for the pianoforte were independent musical compositions, of which B., not N., was the composer; and the entry made under sect. 6 was invalid, and gave no title to the assignee of the registered compositions.

The first count of the declaration alleged an infringement of a copyright, of which the plaintiff was the proprietor, in a book or musical composition called "Die Lustigen Weiber von Windsor, Komische oper, composed by Otto Nicolai. Pianoforte score."

The second count was for the infringement of the copyright in a musical composition called "Die Lustigen Weiber von Windsor. Overture."

The fourth ¹ count was for an infringement of the copyright in a musical composition called "Die Lustigen Weiber von Windsor. Pour le piano seul."

The fifth count was for an infringement of a musical composition called "Die Lustigen Weiber von Windsor, oper in drei akten, musik von Otto Nicolai."

Pleas to each of the counts. First, not guilty.; second, that the plaintiff was not the proprietor of the copyright; third, that the copyright was not a subsisting right; fourth, that the musical composition was printed and afterwards first published in a foreign country named in an Order in Council of Her Majesty, and that such musical composition was not registered, nor was one printed copy of the whole of such musical composition delivered as by law required for the purpose of obtaining the privilege of copyright; fifth, that the plaintiff did not before commencement of the action cause an entry to be made in the book of registry of the

* Stationers' Company of such musical composition as by [* 342] law required.

At the trial before COCKBURN, Ch. J., at the sittings in Middlesex after Michaelmas Term, 1865, it was proved that Otto Nicolai composed an opera called "Die Lustigen Weiber von Windsor," which

¹ The third count was struck out under a Judge's order.

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was first performed at Berlin on the 9th of March, 1849; Otto Nicolai died in May, 1849, and Ferdinand F. Brissler, in the years 1850-51, arranged for Messrs. Bote & Bock, of Berlin, from the original opera, the musical compositions mentioned in the first, second, and fourth counts.

The Gazette, containing an Order in Council founded upon a treaty on copyright between Prussia and England was put in, from which it appeared that from and after the 1st of September, 1846, the authors of books, dramatic works, musical compositions, and any other works of literature, in which the laws of Great Britain give to the British subjects the privilege of copyright, and the executors, administrators, and assigns of such authors respectively shall, as respects works first published within the dominions of Prussia after the 1st of September, 1846, have the privilege of copyright therein for a period equal to the term of copyright, which authors of the like works respectively first published in the United Kingdom are by law entitled to, provided such books, dramatic pieces, and musical compositions have been registered, and copies thereof have been delivered, according to the requirements of 7 Vict., c. 12, within twelve months after the first publication thereof in any part of the Prussian dominions.

A certified copy of an entry of the pianoforte score made at Stationers' Hall under 7 Vict., c. 12, s. 6, was put in, which was as follows:—

Time of Making the Entry.	Title of Book.	Name and Place of Abode of the Author or Composer.	Name and Place of Abode of the Proprietor of the Copyright.	Time and Place of First Publication.
October 4, 1851.	Die Lustigen Weiber von Windsor, Komische Oper, composed by Otto Nicolai. Pianoforte Score.	Otto Nicolai, Berlin.	Ed. Bote and G. Bock, Berlin.	Berlin, 1st Sept. 1851.

[* 343] * Similar entries were put in as to the overture arrangement, and the composition *pour le piano seul*; but in that as to the overture in the fifth column was Berlin, 1850, only, without any day of the month.

A certified copy of an entry of the assignment of the pianoforte

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score to the plaintiff under 5 & 6 Vict., c. 45, s. 13, was put in, which was as follows:—

Date of Entry.	Title of Book.	Assignor of the Copyright.	Assignee of Copyright.
Aug. 15, 1864.	Die Lustigen Weiber von Windsor, Komische Oper, composed by Otto Nicolai. Pianoforte Score.	Emilie Bock, Emil Bock, Ferdinand Schneider, and Edward Pehlemann, all of Berlin, in Prussia, the legal personal representatives of the firm of Gustave Bock and Edward Bote, of Berlin.	George Wood.

Certified copies of similar entries of assignment of the overture and the arrangement *pour le piano seul* were put in evidence.

No evidence was given of any entry made at Stationers' Hall under 7 Vict., c. 12, s. 6, of the book mentioned in the last count of the declaration.

The plaintiff also put in evidence a deed dated 11th of August, 1864, made between Emilie, widow of Gustave Moritz Bock, of the first part; Emil Bock, Ferdinand Schneider, and Privy Councillor Pehlemann, of the second part; William Chapell of the third part; Thomas Willert Beale of the fourth part; and the plaintiff of the fifth part; by which the parties of the first, second, third, and fourth parts assigned to the plaintiff all the opera or musical composition of Otto Nicolai, intituled "Die Lustigen Weiber von Windsor," and all that the libretto or words of the said opera, which were written and composed by Mosenthal, and all the full and absolute copyrights of and in the same opera and libretto, respectively, and all the profits and advantages thereof, and of every part thereof, and all renewals and revisions of copyright, together with all the right of printing and publishing the same opera and libretto, and also of representing or performing the opera, and all the estate, right, title, interest, claim, and demand of them, the * parties of the first, second, third, [* 344] and fourth parts into and upon the premises.

Copies of three books, being the books mentioned in the first, second, and fourth counts, deposited in the British Museum, were put in evidence, from which it appeared that the full title to each of these musical compositions, as first published at Berlin, was

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“Die Lustigen Weiber von Windsor Komisch phantastische Oper in drei Akten, mit Tanz, nach Shakespeare gleichnamigen Lustspiel, bearbeitet von H. S. Mosenthal, Musik von Otto Nicolai.”

It was admitted on behalf of the defendants that they had printed and published the musical compositions mentioned in the first, second, and fourth counts of the declaration; but it was objected that the plaintiff had failed to establish any copyright in either of them, and ought to be nonsuited; and it was contended that the entries, which purported to be made in compliance with sect. 6 of 7 Vict., c. 12, were insufficient, for not setting forth the correct title of the several musical compositions mentioned in the first, second, and fourth counts, and for stating that Otto Nicolai was the composer of them, whereas Brissler and not Nicolai was the composer; that the entry of the overture was also insufficient for stating the year only, and not the day on which it was first published. That the entries at Stationers' Hall of assignment of the musical compositions mentioned in the first, second, and fourth counts did not comply with the requirements of sect. 13 of 5 & 6 Vict., c. 45, by stating the place of abode of the plaintiff as assignee; and that the plaintiff had not made an entry of his proprietorship under sect. 24 of the 5 & 6 Vict., c. 45. The Chief Justice thereupon nonsuited the plaintiff, with leave to move to enter a verdict.

A rule was accordingly obtained to set aside the nonsuit, and enter a verdict for the plaintiff, on the ground that the copyright in the opera had been properly registered under the Copyright Acts, and that it had been duly assigned to the plaintiff, and that such assignment had been duly registered under the Acts, so that the plaintiff was entitled to recover under such assignment.

Jan. 11. Coleridge, Q. C., J. Brown, Q. C., and Blaine, showed cause. . . .

[347] Jan. 12. Parry, Serjt., Patchett, and Pike, in support of
[348] the rule.—. . . With regard to the objection to the entry as to the authorship, Otto Nicolai is the composer of the opera, though Brissler was employed to arrange the music for the pianoforte. He was the editor, who arranged the music and altered the mode of performing it, but he did not alter the melody. What Brissler did would have no value but for the original melodies. A person does not by varying the melodies of a piece of music become the composer of it. The pianoforte score consists of

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a line of notes for the voice, a line of notes for the treble, and a line of notes for the bass, and what those notes express is the composition of Nicolai. Brissler has done nothing new; his work is simply a transposition of what Nicolai has done; the arrangement is merely mechanical. It is not a new invention, or a new work, which would be the subject of copyright.

[COCKBURN, Ch. J. — The pianoforte score is the compression of all the accompaniments of the orchestra. To make the arrangement there must be an effort of the mind. It requires both musical skill and science.]

Brissler was the servant of the proprietors of the copyright employed by them to make the arrangement, and the ideas expressed by the music and the melody of the opera were the creation of Nicolai; and by adapting them to a single instrument Brissler did not become either the author or composer, and he could acquire no copyright in his work. *Hatton v. Kean*, 7 C. B. (N. S.) 268, 29 L. J. C. P. 20; the judgment of ERLE, J., in *Jefferys v. Boosey*, 4 H. L. C., at p. 867.

COCKBURN, Ch. J. — This is an action brought for the infringement of copyright, which is created by the International Copyright Act, 7 Viet., c. 12, and the right, therefore, to maintain the action must depend on a compliance with the conditions imposed by that statute. One of these conditions is, that the work in respect of which copyright is claimed, whether it be literary or musical, shall be registered at the Stationers' Hall. The statute also requires that certain entries shall be made on the register, and, *inter alia*, that the name of the author or composer of the work shall be stated; and unless this formality is complied with, the right which the statute creates does not come into existence.

Now, in this case the work registered was the pianoforte score, or the arrangement for the piano, of the music of an opera called "Die Lustigen Weiber von Windsor," which score was stated to be composed by Otto Nicolai; in point of fact, the arrangement for the piano was not composed by him, but by Brissler, and not published until some months after the death of Nicolai, who, no doubt, was the composer of the original opera. The first question, therefore, which presents itself is, whether the terms of the statute, which requires that the name of the author or composer of the

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book or composition shall be entered on the register, has been complied with. That of course depends on the question— which is one of fact— whether the arrangement of the opera for the pianoforte can be considered as the “composition” of Otto Nicolai, who was the composer of the original opera, or whether it is not the “composition” of Brissler, by whom it was made.

[* 350] * It has been argued very ingeniously, on the part of the plaintiff, that, inasmuch as the opera itself was the creation of the musical genius and mind of Otto Nicolai, in whatever form that opera is reproduced it must still be considered as the work of the original composer. That is an ingenious way of putting the argument, but I cannot think it is a sound one. It seems impossible to believe that any musician, however great his talent, whether as a composer or an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill, and mind so to condense the opera score as to compose the pianoforte accompaniment. I think I may venture to say that even if Otto Nicolai, who composed the original opera, had undertaken to arrange it for the piano, he would have found it required all his musical skill and attainments to accomplish the work. I cannot, therefore, bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half hundred instruments, can be said to be anything else than a specific, separate, and distinct work from the opera itself. And it seems to me that to hold otherwise would lead to very serious consequences. Operas are very frequently arranged, sometimes by the composer of the opera himself, sometimes by other persons, with the consent or without the consent of the original composer. It may be, if the arrangement be made without the consent of the composer of the opera, such an adaptation would be an infringement of his copyright, which would subject the adapter to an action. It is not necessary to decide that. But it may be that, after the copyright has expired, an arrangement for the pianoforte may be made in the first instance, or some musical composer, thinking that an arrangement that already existed of some well known and popular opera is not

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as good as it can be made, might apply his hand to the work, and make a new arrangement. Can it be said that such an arrangement, useful as regards the musical world, shall not be the subject of protection under the Copyright Acts? Yet, if my Brother Parry's argument is good, being founded on the fact

* that there is an identity between the original composi- [* 351]
tion and any form in which the score of that opera can be produced, it would follow that the copyright could exist only in the original opera; and if the original composer adapted his music to the piano or any other instrument, he would have no copyright in such an arrangement as distinct from the opera itself, nor would any one who made the arrangement with his consent, or after the copyright in the opera had expired, have any copyright. That would be a monstrous conclusion at which to arrive, and a most unjust one: as, I am satisfied, very considerable skill, labour, and musical knowledge is required to adapt the music of an entire opera to the pianoforte, or to any single instrument. I think we must hold that the true author of this composition, viz., the arrangement of the music of this opera for the pianoforte, was Brissler, and consequently the name of Otto Nicolai has been improperly entered upon the register as the composer. Whether it was honestly done or not, it is not for me to say. Otto Nicolai was dead, and Brissler was employed by Messrs. Bote & Bock, of Berlin, to compose the pianoforte arrangement, which would be more acceptable to the musical world, no doubt, under the name of Otto Nicolai than if it came from an inferior hand. It may be that that was the reason that Otto Nicolai's name was given as the composer of the arrangement, instead of Brissler's. With that we have nothing to do. I consider it is important that the person who composes the adaptation or arrangement of this kind shall be considered as the author, because otherwise such a composition would be wholly without protection. I think such compositions are useful, and ought to have the protection of the Copyright Acts. I think, therefore, that this objection is fatal to this action.

With regard to another point raised, namely, that the place of abode of the plaintiff as assignee ought to have been on the register. If it were necessary to decide that point, I should desire further time to consider it. I must say that the result of the discussion has been to cause me very strongly to incline to the opinion that sect. 24 of 5 & 6 Vict., c. 45, which requires that the

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proprietor shall be registered before he shall be entitled to bring an action for the infringement of his copyright, does not apply to the case of an assignee to whom the proprietorship is assigned. [* 352] The * moment the copyright is established in the original proprietor, there is nothing to prevent him from assigning by any mode by which property of that description can be assigned in law, the statute only affording one mode of making the assignment more convenient and less expensive than the ordinary mode of conveyance by deed. If the assignment is made under the statute, then, no doubt, its terms must be complied with, and by sect. 13 it is necessary, where an assignment is made, that the name and place of abode of the assignee shall be stated. Unhappily, there is a discrepancy between the enactment in the section and the schedule to which the section expressly refers; for, whereas the section requires that the name and place of abode of the assignee shall be entered in the form given by the schedule, in the form No. 5, given in the schedule, there is no reference whatever to the place of abode of the assignee. But, taking this not to be a statutory assignment, is it necessary that the assignee should cause an entry of proprietorship to be made under sect. 24, before he can sue? Now, I observe that there is a distinction in the earlier sections between "proprietor," as applied to the person by whom the work is originally published, and in whom the property originally vested, and any person who takes by assignment from him; nor do I anywhere in the Act find that the assignee has any right to insist upon having his name entered as the new proprietor: the only case in which the change of the name of the proprietor is to be made being where the statutory form of assignment is resorted to; and even in that case, it is not the assignee but only the assignor who can insist on the change being made in the register. Therefore, to hold that the assignee must make an entry under sect. 24 of his proprietorship, before he can sue for the infringement of the copyright transferred to him, he having no power under the statute, either through the means of this Court, or any other means that I can see, to enforce the registration of an entry by way of assignment under sect. 13, and to apply the term "proprietor" to him would, I think, work considerable inconvenience, if not considerable injustice. However, although I make these observations, in passing, to show the matter has not been overlooked, I do not desire to be understood

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as resting my present judgment on that point. As in this case there was a nonsuit, * the plaintiff can bring another [* 353] action; but as the evidence now stands, not Otto Nicolai, but Brissler, was the composer of the pianoforte arrangement; and, considering that as a substantive and independent work, and one that might have been the subject of copyright itself, I think the name of the true author or composer of the pianoforte score has not been entered on the register at Stationers' Hall; consequently, the plaintiff, who is the assignee, is not entitled to insist upon his copyright and to maintain an action.

The same observations apply to the overture and the arrangement for the *pianoforte seul*. The description in all three is the same, therefore the objection is in all three equally good, and I think the rule to set aside the nonsuit must be discharged.

BLACKBURN, J. — I am of the same opinion. The plaintiff has been nonsuited, and if the nonsuit can be supported on any one ground the rule must be discharged. I agree with my Lord that it can be supported on the objection taken under sect. 6 of 7 Vict., c. 12.

This is an action by the assignee of a foreign proprietor of a musical composition published abroad, and he sues for an infringement of his copyright. His right to sue is founded on 7 Vict., c. 12, and Her Majesty's Order in Council under that statute as to works first published in Prussia. The Act confers upon foreign authors and their assignees a copyright in their works, provided that they comply with the conditions of sect. 6 and the Order in Council. Section 6 requires, among other things, that the title of the copy of the book, and the place of abode of the author or composer thereof, and the name and place of abode of the proprietor of the copyright thereof, and the time and place of the first publication or performance thereof, in the foreign country, named in the Order in Council, shall be entered at the Stationers' Hall. Unless that entry be made, neither the foreign author nor his assignee can enforce the copyright in this country. The question is, Has this been done in the present case? I do not pretend to understand music, and I know nothing beyond what I have gathered in the course of the argument. The facts are, that Otto Nicolai composed the opera, the music of which was for the first * time performed and published at Berlin; but the [* 354]

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musical composition, as to which the plaintiff complains that his copyright has been infringed, is not the music as Nicolai originally composed it, but it is the pianoforte score of the same opera. Perhaps, strictly speaking, this would be matter for a jury, to be explained by the evidence of experts and others skilled in music; but I think the question has been sufficiently discussed to enable us to form an opinion. The fact, as I understand it, is that where an opera is composed so that the music, the theme as one might call it, and probably the genius of the work, is in the form of an opera, it cannot be used for a single instrument like the pianoforte unless some further process is gone through, by which the music which the original composer composed as a score for the whole orchestra is reduced to a score for the pianoforte. In this case, Nicolai having composed the opera, it was subsequently converted into a score for the pianoforte by Brissler, after Nicolai's death. Who, then, is the "composer" of the pianoforte score within sect. 6, Nicolai or Brissler? I think, if the adaptation of Nicolai's music to the pianoforte has a degree of original invention and genius of its own, Brissler would be the author of the arrangement for the pianoforte, and of that arrangement only; because, as at present advised, though the question does not arise in the present case, I should think that Brissler could not publish that arrangement without the consent of Nicolai or his assignees, for I apprehend the music of the pianoforte score includes the music of the opera, of which Nicolai was the composer. So that, to make a perfect entry, there ought to have been an entry of both names. That might easily have been done. The entry might have been "Pianoforte score of 'The Merry Wives of Windsor,' composed by Nicolai, arranged for the pianoforte by Brissler." If that had been done, the conditions of the statute would have been complied with, as it would have stated who was the author or composer of the opera, and who was the author or the composer of the arrangement. I mention this to guard against its being supposed, while we think the composer of the opera is not necessarily the composer of the pianoforte score, that the composer of the pianoforte score can acquire an independent copyright. As soon as it appears that the arrangement of the opera for the pianoforte is an essential and * necessary part of the utility of the book or piece of music in which the copyright is claimed, and that this involves a subordinate act, to be done by another, who is not the

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composer of the opera, then I think Brissler, who did that, was the author and composer, and consequently his name ought to have been stated in order to fulfil the provisions of the 6th section. This is a sufficient ground on which to support the nonsuit.

With regard to the objection that there is no entry of the plaintiff as proprietor of the copyright under sect. 24 of 5 & 6 Vict., c. 45, at first I thought the objection fatal to the plaintiff's case, but after hearing the argument my opinion is much shaken, and I would not support the nonsuit on that ground without further time for consideration. I, however, express no opinion upon it.

With regard to the point as to the date of the publication of the overture, I think that is very clear. In order to comply with sect. 6 of 7 Vict., c. 12, the day of publication, from which the period of the copyright was to run, ought to have been stated. To state the year of publication only is not a sufficient compliance with the statute; but that is a very minor point, and applies only to one of the counts.

MELLOR, J. — I am of the same opinion. It was contended by my Brother Parry that the pianoforte score of the opera was a mere accessory; that it was not an independent work which required independent thought, skill, and composition. I think that in the course of the discussion it had become apparent that it is not within the definition of accessory; it is something quite independent of the original opera itself. It is a work which makes the music of the opera a new mode of enjoyment by persons who can perform it on the piano. On looking at the first column of the entry I find, after the title of the opera, "Composed by Otto Nicolai: pianoforte score." In the next column, which requires the name and place of abode of the author or composer to be stated, I find "Otto Nicolai, Berlin." At the time the pianoforte score was arranged, Otto Nicolai was dead, and he was not the author or composer of the pianoforte score, which is an independent work, requiring the exercise of those faculties to which I have already referred. The objection cannot be answered, because sect. 6 of 7 Vict., *c. 12, requires the name and place of abode of [* 356] the author to be stated, and it is not stated. I agree, therefore, with my Lord and my Brother BLACKBURN, that on this ground the rule must be discharged.

As to the other ground, at first I thought that "proprietor," in

sect. 24 of 5 & 6 Vict., c. 45, included assignee, because where a person assigns his entire interest in a work to another he is no longer a proprietor, but the assignee is the proprietor. But there may be a distinction between the proprietor originally registered and the assignee. It is unnecessary to decide the point, and I therefore express no opinion upon it; more particularly as, on the objection being stated, an assignment by deed was put in, which however still leaves the difficulty whether the assignee must not be registered as proprietor before he can sue by reason of the requirements of sect. 24. I prefer, therefore, with the rest of the Court, to rest my judgment entirely on the ground of the defect in the original entry.

LUSH, J. — I am also of opinion that the pianoforte score is an original composition, and the subject of copyright. It is produced by signs and scales, by which various scores of the opera have been condensed, so as to form one harmonious whole, and producing a piece of music capable of being performed by one person on a piano, and capable of representing, as far as it can be on one instrument, the entire opera. I think it is an entirely new composition, notwithstanding it is compiled from the original opera. That being so, it is clear from the evidence that the author of that composition is not Nicolai, because the arrangement was not even made in his lifetime. Brissler, the person who made it, has unfortunately not been registered as the author or composer. On that ground I think the provisions of the 6th section of 7 Vict., c. 12, have not been complied with, and the plaintiff's title is not complete.

With regard to the other point, I concur with the other members of the Court, in expressing, after the argument we have heard, considerable doubt, whether it is necessary for an assignee under the circumstances in the present case to make an entry of his proprietorship under sect. 24 of 5 & 6 Vict., c. 45. As we [*357] have not * to decide that point, it is unnecessary to say anything more than that I entertain considerable doubt on the subject.

Rule discharged.

The plaintiff's having appealed from the above decision, and having been heard before the Judges in the Exchequer Chamber, the counsel for the defendants were not called on. The following judgments were pronounced:—

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KELLY, C. B.—I cannot but express my [L. R. 3 Q. B. 227] regret that we feel it our duty to affirm the judgment of the Court of Queen's Bench, for I have not any doubt that Brissler, who is the real author of this arrangement of the opera originally composed by Nicolai, was employed and paid to adapt the music to the pianoforte by Bote & Bock, who were the representatives of Nicolai, and under whom the plaintiff claims. The merits of the case are therefore with the plaintiff. He is the proprietor of the work, but unfortunately he has not registered it properly, either in the description of the work itself, which is stated to be "*Die Lustigen Weiber von Windsor, Komische Oper, Pianoforte Score*," or in the name of the author, who is stated to be Otto Nicolai, of Berlin, who in fact was dead about two years before the pianoforte score was brought into existence.

The case is simple enough. Nicolai was the author of an opera, "*Die Lustigen Weiber von Windsor*," which was represented and probably published in March of the year 1849: he is said to have died two months after that period. Nearly two years afterwards, his representatives, Bote & Bock, who had become the proprietors of the opera, employed Brissler, and no doubt paid him, to adapt the opera to the pianoforte, and he has accordingly become the author of the work in question, which is an adaptation of the music of the whole of the opera,—of the original score, prepared for some twenty instruments,—to the pianoforte alone.

The question then is, Can this action be maintained? That depends on whether the plaintiff, who claims as the assignee of Bote & Bock, has complied with the provisions of sect. 6 of the * International Copyright Act (7 Vict., c. 12), which [*228] requires the following particulars to be registered at the time of making the entry: The title of the book; the name and place of abode of the proprietor of the copyright; the time and place of the first publication. On looking at a copy of the entry, we find under the heading "title of book"—and here a point arises—"Die Lustigen Weiber von Windsor, Komische Oper, composed by Otto Nicolai. Pianoforte score." If that means the opera itself, the entire opera, that is, it is not for an infringement of the copyright of the opera itself that the action is brought. If it means the pianoforte score or arrangement for the pianoforte of the opera called "*Die Lustigen Weiber von Windsor*," it may be said to be correctly described. We have now to consider the third column

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on which the question arises, namely, the place of abode of the author or composer, and I do not understand my Brother Parry to dispute that it is necessary, in order to comply with the terms of this statute, that the name and place of abode of the author of the work, which is to be registered and in respect of which the copyright is to be secured by the registration, are to be inserted in this column; but the question is, whether the statute is properly complied with, when we find that the name of author or composer of the work and his place of abode are registered as Otto Nicolai (he having died two years before), with his place of abode as Berlin, and not Brissler, who really made the arrangement. The question in this case is, whether this arrangement and the opera as originally composed is really one and the same work; not as my Brother Parry has argued, whether the arrangement is a piracy of the original work, or would be a piracy of the work if published without the authority of the representatives of Nicolai. Now, in reference to the case that was decided in the Court of Exchequer, *D'Almaine v. Boosey*, 1 Y. & C. Ex. 288, I have no hesitation in saying that if Brissler had published this arrangement for the pianoforte during Nicolai's lifetime without his authority, or since his death without the authority of Bote & Bock, his representatives, he would have pirated the work; or

if there had been a Copyright Act in force in Berlin, such [* 229] as there is in this country, no doubt Nicolai or his * representatives might have maintained an action for the infringement of the copyright against Brissler. But although the work of Brissler, if published without the authority of the composer of the original opera or his representatives, would be the piracy of that work, yet it may be a new and substantive work in itself, and be the subject of a copyright at Berlin, probably according to the law of Prussia, certainly in this country under the Copyright Acts in force. Let us see, in order to understand the question, what the nature of Brissler's work is. My Brother Parry has argued that the arrangement and the original score are one and the same thing; that the melody, the very essence of the music to be found in the opera, pervades the whole of this work of Brissler, and the only difference between the one and the other is that the one is an opera, and the other is only an adaptation of that opera to the pianoforte; but it is only necessary to look at and consider the case for a moment to see that the two works are

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substantially different. The opera is composed and is published in score, and contains in each line of what is called the entire score, the music for some one particular instrument, these instruments being some twenty in number. Now let us come to what the arrangement is for the pianoforte. Undoubtedly there are portions of it which are identical, as in the case before the Exchequer, and might subject, as I have already observed, the author of the adaptation to an action if it had been published without the authority of the author of the opera. But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and, no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all. The accompaniment for the pianoforte is a work of greater or less skill. In

* some cases, perhaps in many cases, — it may be in this [* 230] for aught I know, — the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart's, by Mazzinghi, a work — I would hardly use the term of "great genius," but a work — of great merit and skill of that eminent composer and pianist, Mazzinghi. If such a work be published as the adaptation to the pianoforte by a composer other than the composer of the original opera, no doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation; but whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country as the original composer of the opera; and if any one had by an adaptation pirated that arrange-

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ment, he would be liable to an action for that piracy. I consider that an infallible test to show the difference between the one work and the other — between the original opera and the arrangement of it for the pianoforte. It is perfectly clear, therefore, that in point of fact — for it is rather a matter of fact than anything else — the adaptation to the pianoforte, or the arrangement for the pianoforte, of an opera already published, is itself a new and separate work, and is not one and the same with the original opera. What, then, is the result as applied to the present case? Why, that in order to comply with this section of the act, and so entitle the plaintiff to the benefit of the copyright, the name of Brissler ought to have been inserted as the author and composer instead of Otto Nicolai. I repeat, the whole of this case resolves itself into the simple question, not whether this arrangement for the pianoforte is a piracy of the original opera, if published without the license or consent of the author of the opera, but whether it is one and the same work, so that Nicolai, though dead and buried, was the author of it. I think it is perfectly clear that the opera is one work, and that Nicolai was the author; the arrangement for the pianoforte is another work, of which Brissler is the [* 231] author, and Brissler's name *ought to have been introduced as the author, in order to comply with the Act of Parliament under which this action is brought.

BRAMWELL, B. — I am also of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. It ought to be distinctly understood that the plaintiff is not suing as the assignee of the copyright of the original opera. That cannot be claimed, because, as I understand, it was not registered within a year after its first publication. If the plaintiff has any title at all, it is under the register of the 4th of October, 1851, which is not a registration of the opera of Nicolai's composition, but a registration of what is there called "the pianoforte score," which might more accurately have been called an arrangement of the opera for the voices, with a pianoforte instead of an orchestral accompaniment. Then the question is whether the name of the author of that work is accurately stated, and if it had been called an arrangement for the voices with the pianoforte accompaniment, it would have been manifest that Otto Nicolai was not the author of the arrangement nor of the pianoforte score. The truth is, an opera is originally

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written for the voice and for different instruments. In this pianoforte score, as it is called, the parts written for the voice are identically preserved, and there can be no doubt that if a man had a copyright in the original opera, such a score would be an infringement of his copyright. But when we come to the part, not for the voices, but for the pianoforte, which is not an identical repetition of what the author wrote, it is the business of the adapter, the person who arranges it for the pianoforte, to preserve the harmony and, as far as he can, the notes and all the effects of the original composer, but he cannot produce upon the pianoforte everything that the author wrote, as he wrote it. Anybody who knows anything of the orchestral score and of the pianoforte arrangement, would know that. It is a physical impossibility that fingers could play upon the pianoforte every note as it is written in the orchestral score. For example, where there is a tremolando in the music, — that is, when the violins play the same notes backwards and forwards continually, — of course that cannot be done on the piano, and sometimes for a substitute an octave is played with the thumb and finger. To arrange this to the best advantage great judgment and * considerable power of choice is required on the [* 232] part of the arranger. Frequently there are other differences; there are prolonged notes in the one and not in the other; as the score of the opera is written for several instruments which cannot all be represented on the piano, the arranger puts in an octave below on the piano to give as far as possible the same effect. Many other changes must of necessity be made. It is quite clear, therefore, that what the person who arranges for the pianoforte does is something different from what the original composer has done. Anybody who plays any musical instrument knows it is a very common expression to say, such a piece is very well arranged; such a piece is very ill arranged; this is a very difficult arrangement; that is an easy arrangement. Those who play the German arrangements know they are more difficult than the English, because the German, with great conscientiousness, endeavours to put into the arrangement every note that the composer has put into the score as far as he can; whereas the English composer endeavours in all arrangements to make them clear for the player, and an English arrangement is by no means so laborious as the German. It is manifest, therefore, that there is some judgment and taste required on the part of the arranger for the pianoforte;

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and it is also certain that if it should so happen that a man should compose an opera without being able to play on the pianoforte, — which is, I believe, a perfectly possible thing, — he could not arrange it himself for the pianoforte. The person who arranges for the pianoforte must have a knowledge of the instrument; it would be a bad arrangement if he put in passages that do not lie well for the hands, as it is called, so as to give a facility of playing. I repeat, therefore, that if, instead of this music being called a “pianoforte score,” it had been called “an arrangement for the pianoforte and voices,” it would have been manifest that the name of the author of that was not Otto Nicolai but Brissler, who made this arrangement; and it might be a prudent thing, for aught I know, to state that the author of the opera was Otto Nicolai, and the arranger or the adapter was Brissler. It has been said that there is nothing inventive on the part of the person who makes the arrangement. In one sense there is not, that is to say, he neither invents the tune nor the harmony; but there is [* 233] invention in another sense, or * rather there is composition in the adaptation to the particular instrument. Of that the adapter is the author, and it is perfectly certain that the man who wanted to arrange this opera for a pianoforte, would find it a great deal easier to copy what Brissler had done than to take the score and do it over again. If he took the original score, there would probably be many differences between him and Brissler, and very likely, if Brissler arranged it over again, he would do it differently, because there is no rule by which a man is bound to do it in a particular way. It is clear, therefore, that there is something in the nature of authorship in Brissler, and his name not having been stated as the author in the register, it seems to me manifest the plaintiff has not a copyright of the pianoforte score, as it is called, and consequently cannot complain of this infringement.

WILLES, KEATING, and MONTAGUE SMITH, JJ., and CHANNELL, B., concurred. *Judgment affirmed.*

ENGLISH NOTES.

The right of representation of a dramatic or musical piece, as distinguished from the copyright, has been considered under the title “**DRAMATIC AND MUSICAL COPYRIGHT.**” 9 R. C. 868 *et seq.* In connection with both this and the above title of “**MUSICAL COMPOSITION**” may be

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mentioned the cases of *Hutton v. Kean* (1859), 7 C. B. (N. S.) 268, 29 L. J. C. P. 20, 6 Jur. (N. S.) 226, 2 L. T. 10, 8 W. R. 7, and *Wallenstein v. Herbert* (1875), 16 L. T. 453, 15 W. R. 838, which decide that where A. is employed by B. (upon a verbal contract) to compose music as a mere accessory to the public performance of a dramatic piece,— the general arrangement of the whole representation being designed and carried into execution by B., — A. has, as against B., or his assignee or licensee for the performance of the piece as so arranged, no copyright in the music.

The view which is indicated or assumed in the judgments in the principal case, that the pianoforte arrangement, if published or performed without the consent of the author of the original score, would have been an infringement of the rights of the original author, is amply confirmed by the judgments given in the House of Lords in *Fairlie v. Boosey* (1879), 4 App. Cas. 711, 48 L. J. Ch. 697, 41 L. T. 73, 28 W. R. 4. It is also there decided, that where the original score has not been printed for publication, but an arrangement for the voice with pianoforte accompaniment has been printed and published, the right to the public performance of the original work in this country is properly protected, and the condition of the right of action under sect. 6 of the International Copyright Act (7 & 8 Vict., c. 12) sufficiently complied with, although the music to be protected is described as the “music of the said book,” referring to a book deposited pursuant to the Copyright Acts, containing not the original score, but an arrangement for the voice with pianoforte accompaniment.

In comparing the two decisions it may be useful, even at the risk of some repetition, to quote the observations of Lord BLACKBURN in the latter case upon the former decision. “It is as well,” he says (4 App. Cas. 728), “to state what really was the question in *Wood v. Boosey*, for the case seems to me to have been misunderstood. Otto Nicolai had composed an opera, and caused it to be performed at Berlin on the 9th day of March, 1849. His inchoate rights to a monopoly in this country were exactly the same as those of Offenbach in the present case. The time prescribed by the Order in Council with regard to Prussia is twelve months; that prescribed by the Order in Council with regard to France is three months: that was the only difference. Otto Nicolai died within the twelve months, and neither he nor his representatives did anything to render his rights in this country perfect before the end of the twelve months; and consequently by the 19th section of 7 & 8 Vict., c. 12, neither he nor his assigns could, after that, acquire in this country any rights as to the music first represented in Berlin. But on the 1st of September, 1851, more than twelve months after Nicolai’s death, his personal representatives published in Berlin the music of the opera arranged for the pianoforte, and on the 4th of October made an entry

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in the registry of the opera, 'Pianoforte score,' stating the composer to be 'Otto Nicolai.' The action was for infringing the right to multiply copies of this pianoforte score. The plaintiffs had to maintain two positions: first, that the pianoforte score contained an original composition, not published at Berlin till within twelve months before the 4th of October, 1851; and, secondly, that the composer of that original composition was Nicolai, who had been dead more than twelve months before the 4th of October, 1851, and had in March, 1849, represented at Berlin the whole opera as he composed it. It was certainly very difficult to maintain both positions, and unless he could maintain both the plaintiff was rightly nonsuited. The nonsuit was upheld on the ground that, though he had made out his first position, he had failed in making out his second. What I understand to have been proved in that case was, that in an opera the tunes and the harmonies and accompaniment are the composition of the original composer, in that case Nicolai, in this case Offenbach; but that to bring out these tunes and harmonies, and the effect as far as possible of the accompaniment on any particular instrument or instruments, further work is required. The person who prepares the original score for the performance on the stage by many instruments, and by the voices of many singers, writes down what notes are to be played on each of the instruments, and what notes are to be sung by the different voices. And by that means it is shown what instruments or voices are to play or sing the tune, and what are to produce the harmony and play the accompaniment in a full orchestra and singers. But if the same tunes and harmonies are to be performed on the pianoforte, or sung by voices accompanied by the pianoforte alone, something more is required. It must be indicated what notes are to be played on the pianoforte so as to give the harmony and tune and effect, — not precisely the accompaniment as it would be brought out by the full orchestra, for that, as I understood my Brother BRAMWELL, is impossible, — but to give the harmony and tune as near to that effect as the arranger for the pianoforte can contrive. And that arrangement, although it adopts the harmony and tune, is an original composition, or at least a new work."

In order to the registration necessary to maintain an action, whether under the Copyright Act, 1842, s. 13, or the International Copyright Act, 1844, s. 6, it has been decided that "the time of first publication" to be stated in the entry must be the actual day (and not merely the month or year) of publication, in order that it may be known when the term of forty-two years from the first publication allowed by sect. 3 of the Copyright Act, 1842, will terminate. *Mathieson v. Harrod* (1868), L. R. 7 Eq. 270, 38 L. J. Ch. 139, 19 L. T. 629, 17 W. R. 99; *Collingridge v. Emmott* (1888), 57 L. T. 864.

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As to the *dictum* of COCKBURN, Ch. J. (p. 585, *supra*), to the effect that sect. 24 of the Copyright Act, 1842, requiring that the proprietor shall be registered before he is entitled to bring an action, does not apply to an assignee, the contrary has been decided by KENNEDY, J., in *Liverpool General Broker's Association v. Commercial Press Telegram Bureau* (1897), 2 Q. B. 1, 66 L. J. Q. B. 405; and the action of the unregistered assignee was accordingly dismissed.

AMERICAN NOTES.

This case is cited by Mr. Appleton Morgan in his scholarly treatise on Law of Literature, pp. 290, 291, chapter on "Stageright;" also by Drone on Copyright, *passim*, and in Am. & Eng. Enc. of Law, 2nd ed., p. 534, where is a very exhaustive and immensely valuable list of things that are subject of copyright. Also cited, approved, and followed in *Carte v. Evans*, 27 Federal Reporter, 861, in respect to "The Mikado," the Court observing: "That an arrangement for the pianoforte of the orchestral score of an opera, such as Tracy has produced, is an original composition, within the meaning of the copyright law, is well settled. In executing such a work the ideas of the composer of the opera cannot be wholly reproduced, and other ideas, more or less resembling them, or wholly new, have to be substituted or added. To do such a work acceptably requires musical taste and skill of a high order, and a thorough knowledge of the art of musical composition, and especially of instrumentation. No two arrangers, acting independently, and working from the same original, would do the work in the same way, or would be likely to produce the same results, except so far as they might both resemble the original. An arrangement of this character would undoubtedly be a piracy of the original opera, unless the arranger has in some way acquired the right to make such use of the original; but if he has acquired that right, the arrangement is substantially a new and distinct composition, and, as such, is entitled to the protection of the Court. *Wood v. Boosey*, Law Reports, 2 Queen's Bench, 340; affirmed, Law Reports, 3 Queen's Bench, 223; *Boosey v. Fairlee*, 7 Chancery Division, 301; affirmed, 4 Appeal Cases, 711; *Thomas v. Lennon*, 14 Federal Reporter, 849; Drone, Copyright, 176."

On the subject of new composition the Encyclopedia states two cases as follows:—

"The complainants in the cases of *Schuberth v. Shaw*, 19 Am. Law Register (N. S.), 248; 21 Federal Cases, No. 12,482, were the publishers of a certain musical composition called 'Manola Waltz, arranged by J. M. Lauder,' which had been prepared for them by a musical composer in their employ who made a new arrangement of the piece by a French composer, Waldteufel, called 'Manola Suite de Valses pour Piano.' In making this new arrangement, Mr. Lauder altered and simplified the harmony, and in some cases altered the melody. He abridged the length of the introduction of the waltz, and also the coda. The defendant employed Mr. A. Becket, a musician, to make an arrangement of the Waldteufel music. The defendant's arrangement was very similar to that of the complainants, and was published by him as

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'Manola Waltz, as performed by J. M. Lauder.' Upon a bill being filed by the complainants asking for an injunction restraining the defendant's publication, the Court, after taking testimony, made a preliminary order appointing two musicians as experts to report 'whether the Manola Waltz published by complainants was musically different from the Waldteufel composition, in what the difference consisted, and whether complainants' publication is an original musical composition representing any musical authorship.' These experts reported as follows: 'While we do not consider the publication an original composition, with the exception of the harmony in the last three bars of the introduction, we regard it as an original arrangement and the work of a practical harmonist and musician.' The Court held that the complainants' publication was a substantially new adaptation of an old piece, which might be copyrighted, and the injunction was granted.

"In the case of *Reed v. Carusi*, Taney's Decisions (U. S.), 72; 20 Federal Cases, No. 11,642, an action of debt for the infringement of copyright obtained by the plaintiff's assignor in the music of the well-known ballad called 'The Old Arm Chair,' the Court said: 'If the said musical composition was borrowed altogether from a former one, or was made up of different parts copied from older musical compositions without any material change, and put together into one tune with only slight and unimportant alterations or additions, then Russell (the plaintiff's assignor) was not the author within the meaning of the law; but the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design and in its material and important parts, the effort of his own mind.'"

But a new arrangement must be something more than a mere copy with additions and variations such as a musical writer with skill and experience might easily make. *Jollie v. Jaques*, 1 Blatchford (U. S. Circ. Ct.), 618; *Carte v. Duff*, 23 id. 347; 25 Federal Reporter, 183 (citing *Boosey v. Fairlie*), another case concerning "The Mikado."

In *Reed v. Carusi*, *supra*, tried before Chief Justice Taney, a professional singer was called in, sworn, and sang the two airs to the jury. The same test was resorted to in very recent days. On a recent hearing in the New York Supreme Court, upon the application of Henry E. Dixey, the comedian, for an injunction against the singer of a song which he claimed to be an infringement of his copyright in the song, "It's English, You Know," Mr. Dixey upon the witness stand, was asked by the defendant's counsel to sing the song; but his own counsel objected. On an appeal to the Court for a ruling on the admissibility of the evidence, the defendant was allowed to ask for a repetition of the words of the song. Mr. Dixey evidently did not want to sing the song; and before he could do so, Judge Allen said that a copy of the words would be more satisfaction to him, and a recess was then taken while Mr. Dixey wrote out the words. After the recess, Mr. George Purdy, leader of the Boston Museum orchestra, was called and sworn. He took his violin, and placing the score of Mr. Dixey's song against a directory, played the tune to His Honor. The music caused both the Court and spectators to relax their features. The other song, "Quite English," was then played on the

No. 1. — Pordage v. Cole, 1 Saunders' Rep., ed. by Williams, 319. — Rule.

violin by the witness, and the resemblance was so close that all recognized it. A score was then presented of "When the Band Begins to Play," and that also was rendered by the witness. Mr. Purdy did not think that there was any resemblance between the "English" songs and "When the Band Begins to Play," at least to the ear of a musician. Several experts testified to the similarity of the songs. Mr. Dixey's performance was a broad burlesque of Sir Henry Irving in "Hamlet."

MUTUAL COVENANTS (OR PROMISES).

No. 1. — PORDAGE v. COLE.

(K. B. 1669, 1670.)

No. 2. — BOONE v. EYRE.

(K. B. 1777.)

RULE.

WHERE covenants (or promises) are made by two parties to a deed or agreement, and are such that the thing covenanted or promised to be done, on each part, enters into the whole consideration for the covenant or promise on the other part, the covenants are dependent (or the promises are said to be mutual conditions), and the performance or readiness to perform on each part is a condition precedent for the exaction of the covenant or promise on the other part. But where a covenant on the part of the plaintiff goes only to a part of the consideration, and a breach may be paid for in damages, there the defendant has a remedy on the covenant, and shall not plead it as a condition precedent.

Pordage v. Cole.

1 Saunders' Rep., ed. by Williams, pp. 319, 320.

Covenants or Conditions. — Dependent or Independent.

If it be agreed between A. and B. that B. shall pay A. a sum of money [319] for his lands, &c., on a particular day, these words amount to a covenant by A. to convey the lands; for "agreed" is the word of both; but it is an inde-

No. 1. — *Pordage v. Cole*, 1 *Saunders' Rep.*, ed. by Williams. 319, 320.

pendent covenant, and A. may bring an action for the money before any conveyance by him of the land.

Debt upon a specialty for £774 15s. The plaintiff declares that the defendant, by his certain writing of agreement made at, &c., by the plaintiff by the name, &c., and the defendant by the name, &c., and brings the deed into Court, &c., it was agreed between the plaintiff and defendant in manner and form following (viz.) that the defendant should give to the plaintiff the sum of £775 for all his lands, with a house called Ashmole-house thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheelbarrow; and that in pursuance of the said agreement, the defendant had given to the plaintiff 5s. as an earnest; and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of £775 a week after the feast of St. John the Baptist then next following (all other movables, with the corn upon the ground, except). And although the defendant has paid five shillings, parcel, &c., yet the said defendant, although often requested, has not paid the residue to the damage, &c. The defendant prays *oyer* of the specialty, which is entered *in hæc verba*, to wit: "11 May, 1668. It is agreed between Doctor John Pordage and Bassett Cole, Esquire, that the said Bassett Cole shall give unto the said doctor £775, for all his lands, [320] with Ashmole-house, thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheelbarrow. In witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5s.; the money to be paid before midsummer, 1668; all other movables, with the corn upon the ground, excepted." And upon *oyer* thereof the defendant demurs. And Within, of counsel with the defendant, took several exceptions to the declaration: 1. That the demand by the declaration is of £774 15s.; whereas the whole sum is £775; and the 5s. paid for earnest shall not be taken as part of the sum of £775. *Sed non allocatur*; for *per Curiam* it shall be intended as part of the sum. 2. That the exception of the residue of the movables is not well recited: for the word except in the declaration is not good for want of sense. *Sed non allocatur*; for it is sensible enough in the declaration: and if it were not, the declaration is good; for an insensible clause

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does not make the rest of the deed vicious which is sensible in itself. 3. The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money. And it was argued by Withins, that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part: *Trin. 12 Jac. I.*, between *Holder v. Tayloe*, 1 *Roll. Abr.* 518 (C), pl. 2, 3; *Ughtred's Case*, 7 *Co. Rep.* 10, and *Sir Richard Pool's Case* there cited, and *Gray's Case*, 5 *Co. Rep.* 78, 79; s. c. *Cro. Eliz.* 405; and that the word (*pro*) made a condition in things executory: *Co. Litt.* 204 a. And here in this case it is a condition precedent which ought to be performed before the action brought; wherefore he prayed judgment for the defendant.

But it was adjudged by the Court that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement, as it is here. And by the conclusion of the deed it is said that both parties had sealed it; and therefore judgment was given for the plaintiff, which was afterwards affirmed in the Exchequer Chamber, *Trin. 22 of King Charles the Second*.

The following note by Mr. Serjeant Williams has been frequently cited as a classic authority:—

Almost all the old cases, and many of the modern ones on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained what covenants are independent, and what dependent; and, of course,

when it is necessary to aver performance in the declaration, and when not. Thus, if A. covenant with B. to serve him for a year, and B. covenant with A. to pay him £10, it is held that these are independent covenants, and A. may maintain an action against B. for the money before any service; but if B. had covenanted to pay him £10 for the service, these words make the service a condition precedent, and A. cannot enforce payment of the money until he has performed the service. So where A. covenants with B. to marry his daughter, and B. covenants to convey an estate to A. and the daughter in special tail, it is said that though A. marry another woman, or the daughter another man, still A. may have an action against B. on the covenant; but if B. had covenanted to convey the estate for the cause aforesaid, the marriage is a condition precedent, and no action will lie until it be solemnised. 15 Hen. VII. 10, pl. 17; Bro. Covenant, 22; *Thorpe v. Thorpe*, 12 Mod. 460; *Lampleigh v. Brathwait*, Hob. 106. Also where A., in consideration of £10, promised to deliver to B. all the books of the law, it has been said that B. may bring an action against A. for the books before any payment; but if A., in consideration that B. will pay him £10, will deliver to him all the books of the law, B. cannot bring an action for the books before he has paid the money. *Everard v. Hopkins*, 1 Rol. Rep. 125, per COKE, Ch. J. So where B. covenanted with C., his copyholder, to assure to him and his heirs the freehold and inheritance of his copyhold, and C., in consideration of the same performed, covenanted to pay such a sum, it was adjudged that this was a condition precedent, and B. must make the assurance before he is entitled to the money; but if the words had been, in consideration of the said covenant to be performed, B. might bring an action for the money before he made the assurance. *Brocas's Case*, 3 Leon. 219. And lastly, where articles of agreement were made between A. and B., and a covenant by A., that, for the consideration thereafter expressed, he should convey certain lands to B. in fee, and B., on his part, for the consideration aforesaid, covenanted to pay a sum of money to A.,—it was held that these were independent covenants, and A. might bring an action for the money before any conveyance of the lands. 1 Rol. Abr. 415, pl. 8; s. c. cited 12 Mod. 463; *Thorpe v. Thorpe*, 1 Ld. Raym. 665, 666, 1 Lutw. 251, 252. There are many other authorities of a similar nature which I refer the reader to. *Spanish Ambassador v. Gifford*, 1 Rol. Rep.

336; *Bettisworth v. Campion*, Yelv. 133, 134; *Nichols v. Raynubred*, Hob. 88; *Beany v. Turner*, 1 Lev. 293; *Gibbons v. Prewd*, Hard. 102, 103; *Blackwell v. Nash*, 1 Str. 535; *Dawson v. Myer*, 1 Str. 712; *Martindale v. Fisher*, 1 Wils. 88. Hence it appears that the Judges in these cases seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties. For the rule which is contained in them all seems clear and indisputable, that where there are several covenants, promises, or agreements, which are independent of each other, one party may bring an action against the other for a breach of his covenants, &c., without averring a performance of the covenants, &c., on his, the plaintiff's part; and it is no excuse for the defendant to allege in his plea a breach of the covenants, &c., on the part of the plaintiff; according to Justinian's rule in the civil law, "*Qui actionem habet ad rem recuperandam, ipsam rem habere videtur.*" Justin. de Regulis Juris, 361. But where the covenants, &c., are dependent, it is necessary for the plaintiff to aver and prove a performance of the covenants, &c., on his part, to entitle himself to an action for the breach of the covenants on the part of the defendant; and so are also *Ughtred's Case*, 7 Co. Rep. 10 a, b; *Kingston v. Preston*, Doug. 690, 3rd ed., cited in *Jones v. Barkley*. The difficulty lies in the application of this rule to the particular case. It is justly observed that covenants, &c., are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties and the good sense of the case; and technical words should give way to such intention. *Hotham v. East India Company*, 1 T. R. 645; *Porter v. Shephard*, 6 T. R. 668; *Campbell v. Jones*, 6 T. R. 571; *Morton v. Lumb*, 7 T. R. 130. In order therefore to discover that intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules, which will perhaps be found useful for that purpose.

1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not

intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act. *Dyer*, 76 a, in margin; *Thorpe v. Thorpe*, 1 Salk. 171, 1 Ld. Raym. 665, 1 Lutw. 250, 12 Mod. 461, 1 Vent. 177; *Peter v. Opie*, per HALE, Ch. J., 2 Saund. 350, 1 Salk. 113; *Callonel v. Briggs*, 2 H. Bl. 389; *Terry v. Duntze*, 6 T. R. 572; *Campbell v. Jones*, 1 B. & Ad. 124. This seems to be the ground of the judgment in this case of *Pordage v. Cole*, the money being appointed to be paid on a fixed day, which might happen before the lands were, or could be, conveyed. And upon the same ground is 48 Edw. III. 2, 3, decided. Lord Holt, in *Thorpe v. Thorpe*, 12 Mod. 461, 1 Lutw. 250, 251, observes, that the report of 48 Edw. III., in *Ughtred's Case*, 7 Co. Rep. 10 b, is incorrect. It is thus put in that book. Sir Richard Pool covenants with Sir Ralph Tolcelser to serve him with three esquires in the wars of France; Sir Ralph Tolcelser covenants, in consideration of those services, to pay him so much money; and it is said that an action will lie for the money before any service. But in the book at large the case will be found to have been adjudged upon the above-mentioned rule. The report is this: Sir Richard Pool covenants with Sir Ralph Tolcelser to serve him with three esquires in the wars of France; and Sir Ralph covenants with him to pay so much money for the service; and it was further agreed that half the money should be paid in England on a certain day before they went for France; and the rest by quarterly payments (which also might incur before the service): and it was held that an action might be brought for the money before the service.

But, 2, when a day is appointed for the payment of money, &c., and the day is to happen after the thing which is the consideration of the money, &c., is to be performed, no action can be maintained for the money, &c., before performance. *Thorpe v. Thorpe*. 2d resolution, 1 Salk. 171, 12 Mod. 462, 1 Ld. Raym. 665, 1 Lutw. 251, *Dyer*, 76 a, pl. 30.

3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. As where A. by deed conveyed to B. the equity of redemption of a plantation

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in the West Indies, together with the stock of negroes upon it, in consideration of £500, and an annuity of £160 for life, and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and B. should quietly enjoy: and B. covenanted that, A. well and truly performing all and every thing therein contained on his part to be performed, he would pay the annuity: in an action by A. against B. on this covenant, the breach assigned was, the non-payment of the annuity: plea, that A. was not at the time legally possessed of the negroes on the plantation, and so had not a good title to convey. The Court of K. B. on demurrer held the plea to be ill, and added, that if such plea were allowed, any one negro, not being the property of A., would bar the action. *Boone v. Eyre*, 1 H. Bl. 273 *u.*, 2 Bl. Rep. 1312 (p. 609, *post*). The whole consideration of the covenant on the part of B. the purchaser to pay the money, was the conveyance by A. the seller to him of the equity of redemption of the plantation, and also the stock of negroes upon it. The excuse for non-payment of the money was, that A. had broke his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A. had conveyed the equity of redemption to B., and so had in part executed his covenant, it would be unreasonable that B. should keep the plantation, and yet refuse payment, because A. had not a good title to the negroes. 6 T. R. 573, per ASHHURST, J. Besides, the damages sustained by the parties would be unequal, if A.'s covenant were held to be a condition precedent. *Duke of St. Alban's v. Shore*, 1 H. Bl. 279. For A. on the one side would lose the consideration money of the sale, but B.'s damage on the other might consist perhaps in the loss only of a few negroes. So where it was agreed between C. and D. that, in consideration of £500, C. should teach D. the art of bleaching materials for making paper, and permit him, during the continuance of a patent which C. had obtained for that purpose, to bleach such materials according to the specification; and C., in consideration of the sum of £250 paid, and of the further sum of £250 to be paid by D. to him, covenanted that he would with all possible expedition teach D. the method of bleaching such materials, and D. covenanted that he would, on or before the 24th of February, 1794, or sooner, in case C. should before that time have taught him the bleaching of such materials, pay to C. the further sum of £250; in covenant by C. against D. the breach

assigned was the non-payment of the £250. Demurrer, that it was not averred that C. had taught D. the method of bleaching such materials. But it was held by the Court that the whole consideration of the agreement being that C. should permit D. to bleach materials as well as teach him the method of doing it, the covenant by C. to teach formed but part of the consideration, for a breach of which D. might recover a recompense in damages. And C. having in part executed his agreement by transferring to D. a right to exercise the patent, he ought not to keep that right without paying the remainder of the consideration, because he may have sustained some damage by D.'s not having instructed him; and the demurrer was overruled. *Campbell v. Jones*, 6 T. R. 570. Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. And hence, too, it seems it must appear upon the record that the consideration was executed in part: As in *Boone v. Eyre*, above mentioned, the action was on a deed, whereby the plaintiff had conveyed to the defendant the equity of redemption of the plantation; for the defendant did not deny the plaintiff's title to convey it. So in *Campbell v. Jones*, the plaintiff had transferred to the defendant a right to exercise the patent. Therefore, if an action be brought on a covenant or agreement contained in articles of agreement or other executory contract where the whole is future, it seems necessary to aver performance in the declaration of the whole, or at least of part of that which the plaintiff has covenanted to do; or at least it must be admitted by the plea that he has performed part. As where A., by articles of agreement, in consideration of a sum of money to be paid to him by B. on a certain day, covenants to convey to B. on the same day a house together with the fixtures and furniture therein, and that he was lawfully seised of the house, and possessed of the fixtures and furniture: in an action against B. for the money, A. must aver that he conveyed either

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the whole of the premises, or at least the house, to B., or it must be admitted by B. in his plea that A. did convey the house, but was not lawfully possessed of the furniture or fixtures.

4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. *Large v. Cheshire*, 1 Vent. 147; *Duke of St. Alban's v. Shore*, 1 H. Bl. 270.

5. Where two acts are to be done at the same time, as where A. covenants to convey an estate to B. on such a day, and in consideration thereof B. covenants to pay A. a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part, though it is not certain which of them is obliged to do the first act; and this particularly applies to all cases of sale. *Callonel v. Briggs*, 1 Salk. 112, 113; *Thorpe v. Thorpe*, *ibid.* 171; *Lancashire v. Killingworth*, 2 Salk. 623; *Kingston v. Preston*, Doug. 691, 3d ed.; *Jones v. Barkley*, *ibid.* 684; *Goodisson v. Nunn*, 4 T. R. 761; *Porter v. Shephard*, 6 T. R. 665; *Morton v. Lamb*, 7 T. R. 125; *Glazebrook v. Woodrow*, 8 T. R. 366; *Peters v. Opie*, 2 Saund. 352, note (5); *French v. Campbell*, 2 H. Bl. 178; *Phillips v. Fielding*, *ibid.* 123; *Holdipp v. Otway*, 2 Saund. 106; *Rawson v. Johnson*, 1 East, 203; *Heard v. Wadham*, *ibid.* 619; *Hall v. Cazenore*, 4 East, 477; *Martin v. Smith*, 6 East, 555.

Boone v. Eyre.

1 H. Bl. 273 n. (2 R. R. 768).

Mutual Conditions. — Independent Covenants.

Covenant on a deed, whereby the plaintiff conveyed to [273] the defendant the equity of redemption of a plantation in the West Indies, together with the stock of negroes upon it, in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted that the plaintiff well and truly performing all and every thing therein contained on his part to be performed, he, the defendant, would pay the annuity. The breach assigned was the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making

the deed, legally possessed of the negroes on the plantation, and so had not a good title to convey.

To which there was a general demurrer.

LORD MANSFIELD. — The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.

ENGLISH NOTES.

The decisions in which these cases, and particularly the judgment of LORD MANSFIELD in *Boone v. Eyre*, have been cited and followed are very numerous. It may be sufficient to refer very briefly to some of the less recent cases. In the following, the covenants or promises have been held to be independent: *Ritchie v. Atkinson* (1808), 10 East, 295, 10 R. R. 307; *Davidson v. Gwynne* (1810), 12 East, 381, 11 R. R. 420; *Carpenter v. Cresswell* (1827), 4 Bing. 409, 29 R. R. 587; *Stavers v. Curling* (1836), 3 Bing. N. C. 355, 6 L. J. (N. S.) C. P. 41; *Tarabochia v. Hickie* (1856), 1 H. & M. 183, 26 L. J. Ex. 26; *Seeger v. Duthie* (Ex. Ch. 1860), 8 C. B. (N. S.) 72, 30 L. J. C. P. 65, 7 Jur. (N. S.), 239, 9 W. R. 166; *MacAndrew v. Chapple* (1866), L. R. 1 C. P. 643, 14 L. T. 556, 14 W. R. 891; *Button v. Thompson* (1869), L. R. 4 C. P. 320, 38 L. J. C. P. 225.

Ritchie v. Atkinson, *supra*, was an action for freight under a charter-party by which the shipowners undertook to perform a voyage in which they were to load a complete cargo and deliver the same in London on being paid freight at so much per ton; and the question was whether the delivery of a complete cargo was a condition precedent to the recovery of any freight. LORD ELENBOROUGH said: "That depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract: whether of two things reciprocally stipulated to be done, the performance of the one does in sense and reason depend upon the performance of the other. The rule was well laid down by LORD MANSFIELD in *Boone v. Eyre*, that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a part, there a remedy lies on the

covenant to recover damages for the breach of it, but it is not a condition precedent."

The judgment of TINDAL, Ch. J., in *Starers v. Curling*, *supra*, lays down the principle in language which has been repeatedly cited, as follows: "The rule has been established by a long series of decisions in modern times, that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way." And he goes on to cite, as one means of discovering the intention, the criterion as stated by Lord MANSFIELD in *Boone v. Eyre* and reiterated by Lord ELLENBOROUGH in *Ritchie v. Atkinson*, *supra*.

In *Button v. Thompson* (1869), L. R. 4 C. P. 320, 38 L. J. C. P. 225, a seaman had shipped under articles by which he agreed to serve on a voyage to certain places named and home to the final port of discharge; in consideration of which services to be duly performed, the master agreed to pay him as wages a certain sum per month. The seaman was left behind at one of the ports. The jury found that there was no desertion, but that the seaman had been guilty of drunkenness and abusive language to the subversion of discipline, and was left behind through his own negligence. The Court (BYLES, J., and SMITH, J., *dissentiente* BRETT, J.) held that he was entitled to his wages up to the time of his being left behind.

In the following cases the covenants or promises have been held to be dependent on the concurrent acts to be done: *Gladholm v. Hayes* (1841), 2 Man. & Gr. 257, 2 Scott N. R. 471, 10 L. J. C. P. 98; *Ollive v. Booker* (1847), 1 Ex. 416, 17 L. J. Ex. 21; *Oliver v. Fielden* (1849), 4 Ex. 135, 18 L. J. Ex. 353; *Marsden v. Moore* (1859), 4 H. & N. 500, 28 L. J. Ex. 288; *Paynter v. James* (1867), L. R. 2 C. P. 348, 16 L. T. 660, 15 W. R. 493.

Paynter v. James (1867), *supra*, was an action by the shipowner for the balance of freight under a charter-party containing the stipulation: "Freight to be paid one-third in cash on arrival, and two-thirds on right delivery of the cargo of the said ship;" it was held that the delivery of and payment for the two-thirds were concurrent acts; and that to entitle the shipowner to recover the two-thirds, it was sufficient to show that he was ready and willing to deliver, and that the defendant had not been ready and willing to pay.

Both sides of the rule are illustrated by *Storer v. Gordon* (1814), 3 M. & S. 308, 15 R. R. 499, where by charter-party the shipowner covenanted to proceed to Naples and there make a right and true delivery of the outward cargo, restraint of princes, &c., excepted, and the freighters

covenanted in consideration of the premises to provide a full and complete return cargo, and that £1750 should be paid on delivery of the outward cargo which should be considered as earned for outward freight. On the arrival of the ship at Naples the outward cargo was seized by the government there. In an action by the shipowner against the freighters for not providing a return cargo, it was held to be no defence that the outward cargo had not been delivered; for its delivery was not a condition precedent to the providing of the return cargo. But it was also held that the delivery of the outward cargo was a condition precedent to the payment of the £1750 for outward freight, and a breach assigned for non-payment of this sum was held not sustainable.

The two principal cases, as well as Mr. Serjeant Williams's note, have been frequently cited in the arguments and judgments in actions upon contracts for sale of goods to be delivered in certain quantities periodically, where the question has been whether the failure on the one part in respect to one or more of the stipulated deliveries has exonerated the other party from further performance of the contract. The cases previous to the decision of the House of Lords in the case of *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434, 53 L. J. Q. B. 497, 51 L. T. 637, 32 W. R. 989, are conflicting. They are *Withers v. Reynolds* (1831), 2 B. & Ad. 882, 36 R. R. 782; *Hoare v. Rennie* (1859), 5 H. & N. 19, 29 L. J. Ex. 73; *Jonassohn v. Young* (1863), 4 B. & S. 296, 32 L. J. Q. B. 385, 11 W. R. 962; *Simpson v. Crippin* (1872), L. R. 8 Q. B. 14, 42 L. J. Q. B. 28, 27 L. T. 546, 21 W. R. 141; *Freeth v. Burr* (1874), L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. 773, 22 W. R. 370; *Reuter v. Sala* (C. A. 1879), 4 C. P. D. 239, 48 L. J. C. P. 492, 40 L. T. 476, 27 W. R. 631; *Honck v. Muller* (C. A. 1881), 7 Q. B. D. 92, 50 L. J. Q. B. 529, 45 L. T. 202, 29 W. R. 830. In the cases of *Hoare v. Rennie* and *Honck v. Muller*, the Courts, on the ground that the failure to deliver or take delivery of the first instalment was a breach at the outset, considered the other party entitled to throw up the entire contract. The decision in *Reuter v. Sala* was on somewhat similar grounds. In this case, as well as in *Honck v. Muller*, BRETT, L. J., dissented and emphatically disapproved of the judgment of the majority. In *Simpson v. Crippin* and *Freeth v. Burr*, the doctrine that a mere failure of one party in the first delivery is to entitle the other to throw up the contract is repudiated. The case of *Withers v. Reynolds* was decided on the ground that there was an express refusal to perform the contract; and the decision in *Jonassohn v. Young* seems to have been placed on an implied refusal.

Most of these decisions are considered and criticised in the judgments delivered in the House of Lords in *Mersey Steel and Iron Co. v. Naylor* (1884), 9 App. Cas. 434, 53 L. J. Q. B. 497, 51 L. T. 637, 32 W. R.

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989 (affirming C. A. 1882, 9 Q. B. D. 648, 51 L. J. Q. B. 576, 47 L. T. 369, 31 W. R. 80); and the effect of the judgments delivered by the Lords present, as well as of the Judges of the Court of Appeal, is to approve of the rule stated by COLERIDGE, Ch. J., in *Freeth v. Burr* (1874), L. R. 9 C. P. 208, 43 L. J. C. P. 91, 29 L. T. 773, 22 W. R. 370, namely, that *the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract*. The facts in this case of *Mersey Steel and Iron Co. v. Naylor* were that the defendants had agreed to purchase from the plaintiff company 5000 tons of steel blooms, to be delivered on board at Liverpool by instalments of 1000 tons monthly, the first to be made in January, 1881, payment to be made within three days of the shipping documents. The company in January delivered part of the first instalment, but before the payment became due a petition was presented to wind up the company. The defendants under mistaken advice refused to pay for the goods delivered unless the company obtained an order from the Court to protect them in doing so. The company replied that they should treat this refusal as putting an end to the contract. Afterwards the defendants offered to pay for the goods, and insisted on the company performing the rest of their contract. The question was whether the company were entitled to treat the defendant's refusal to pay as putting an end to the contract. In effect the Lords held, affirming the decision of the Court of Appeal, that the facts did not constitute either an express or constructive refusal by the company to perform the contract on their side by paying for the steel; and that consequently the defendants were entitled to damages on their counterclaim for damages in respect of the failure of the company to perform the contract by delivery of the remainder of the iron.

The effect of this decision is to overrule the cases of *Hoare v. Rennie* and *Honck v. Muller*, *supra*, and to make the decision in *Jonassohn v. Young* and *Reuter v. Sala*, *supra*, at least questionable. *Withers v. Reynolds* may still be considered an authority, so far as the facts warranted the Court in considering the acts of the plaintiff evinced the intention to repudiate the contract. The facts there were that the plaintiff, contrary to the contract, insisted on keeping back the payment for each instalment until the delivery of the next subsequent one.

A case somewhat similar to the class of cases above criticised was the case of a charter-party decided by the Common Pleas in 1872, *Bradford v. Williams*, L. R. 7 C. P. 259, 41 L. J. Ex. 164, 26 L. T. 641, 21 W. R. 782. The plaintiffs had chartered a ship in May for coasting voyages over a period of ten months, on the terms that she should be loaded and discharged with all possible despatch — to load with G. or

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H. at captain's option until September, but after September with H. In September the captain exercised his option to load with G.; but the plaintiffs refused to load him with G., whereupon the defendant declined further to perform the charter-party. It was held that the breach committed by the defendant to load with G. went to the root of the contract, and justified the defendant in his refusal. The judgment, although partly rested on *Hoare v. Rennie*, is perhaps, equally with *Withers v. Reynolds* (also cited in the judgment), consistent with the *ratio decidendi* of *Mersey Steel and Iron Co. v. Naylor*.

The decision of the House of Lords in *Mersey Steel and Iron Co. v. Naylor* was applied by the Court of Appeal in *Dickinson v. Farnshaw* (1892), 8 Times Rep. 271, where, under a contract for a large quantity of ore to be delivered in equal monthly quantities over the year 1890, the Court of Appeal held that repeated refusals by the plaintiffs to take the full monthly deliveries — the correspondence showing that, while they advanced an untenable excuse for the delay in taking delivery, they insisted on the performance of the contract — did not entitle the defendants to throw up the contract.

AMERICAN NOTES.

Where there is a mutual covenant or promise to convey land or to do something at a future time, the covenant or promise of the one party is a consideration for the covenant or promise of the other. No other consideration is requisite to a good contract. A promise by one party alone without any promise by the other is void: as, where one in writing declares he will sell to another a house at a certain price: this is a mere proposition, and not a contract. *Tucker v. Woods*, 12 Johnson (N. Y.), 190; *Keep v. Goodrich*, 12 Johnson (N. Y.), 397; *Utica & Schenectady R. R. Co. v. Brunkerhoff*, 21 Wendell (N. Y.), 139; *James v. Fulcrad*, 5 Texas, 512; 55 Am. Dec. 743.

Reciprocal covenants are themselves the consideration, and their performance is not essential to their validity unless the covenants are dependent, and performance by one is a condition precedent to the performance of the other. *Pike v. Thomas*, 4 Bibb (Kentucky), 486; *Hunt v. Livermore*, 5 Pickering (Mass.), 395; Bishop on Contracts, § 76.

In a contract for the sale of lands on a certain day the covenant to convey and the covenant to pay the consideration are dependent covenants, and one party cannot maintain an action against the other for non-performance, without showing a performance on his own part, or a readiness to perform. *Bean v. Abwater*, 4 Connecticut, 3; 10 Am. Dec. 91; *Jones v. Gardner*, 10 Johnson (N. Y.), 266; *Robb v. Montgomery*, 20 Johnson (N. Y.), 15; *Gazley v. Price*, 16 Johnson (N. Y.), 267; *Tompkins v. Dudley*, 25 New York, 272; *Howe v. Mitchell*, 17 Maine, 85; 35 Am. Dec. 231; *Appleton v. Chase*, 19 Maine, 74; *White v. Mann*, 26 Maine, 361; *Lawrence v. Dole*, 11 Vermont, 549; *Powell v. Dayton, Sheridan, &c. R. Co.*, 11 Oregon, 356; 12 id. 488; *Bollman v. Burt*, 61 Maryland, 415; *Roach v. Dickinson*, 9 Grattan (Virginia), 154, 160. This

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rule was applied where parties entered into a contract for the sale of land, stipulating that one-third of the purchase-money should be paid on a certain day, when the land was to be conveyed free from all incumbrances, and the remaining purchase-money should be paid by instalments. The purchaser entered into possession, but not having paid the first instalment on the day named, no conveyance was tendered. Subsequently the seller tendered a deed which the purchaser refused to accept, part of the first instalment never having been paid. The seller afterwards brought an action for the part of the first instalment remaining unpaid and other instalments that had become payable under the contract. It was held that the defendant could not give evidence of damages sustained through the plaintiff's failure to convey the land on the day. *Cassell v. Cooke*, 8 Sergeant & Rawle (Penn.), 267; 11 Am. Dec. 610, 616. "It is a principle of natural justice and received law that if a vendor or vendee wishes the other to observe a contract, he immediately makes his part of the agreement precedent: for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal. So that a vendor cannot bring an action for the purchase-money without having executed the conveyance, or offered so to do, unless the purchaser has discharged him from doing it: and, on the other hand, a purchaser cannot maintain an action for a breach of contract without having tendered the purchase-money." Per Duncan, J.

Where a written contract requires certain acts to be done by one party, which must, in the order of events, necessarily be done before the other party can fulfil his part of the contract, the doing of such acts is a condition to maintaining an action for non-performance by the other party, although there is a stipulation for liquidated damages for not doing them, and there is a time fixed for payment, sufficiently distant to allow the work to be done in the mean time. Chief Justice SHAW, delivering the opinion, said: "Suppose B. agrees to build, at his own shop, a carriage for A., of A.'s materials; A. stipulates seasonably to furnish materials, and to pay B. in four months; and each, upon failure, stipulates to pay a sum as liquidated damages. The furnishing or tendering the materials by A. is a condition precedent. Without it, B. cannot perform. He must build it of A.'s materials. Even building it of his own would not be a performance. B. has his shop, his tools, and his workmen all ready, but A. does not furnish the materials. If B. sues A., averring readiness to perform, he may recover. But if A. sues B. for not building the carriage, it would be a good answer that A. himself had not furnished the materials; because, whatever else the contract may contain, this is in its nature a condition precedent." *Cadwell v. Blake*, 6 Gray (Mass.), 402, 409.

In an executory contract, where the agreement is that one shall do an act for the doing of which the other is to pay, the doing of the act is a condition precedent to the payment, and payment cannot be enforced until the thing is performed for which payment is to be made. *Johnson v. Reed*, 9 Massachusetts, 78, 84. PARKER, J., delivering judgment, said: "It is true that, in the promise declared on in the case under consideration, a certain day is appointed for the payment; and that the thing to be done by the plaintiff might, by possibility, not have been in his power to perform before the day of payment.

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But it did, in fact, take place before, and it was contemplated by the parties that it would, and that seemed to be the basis of the defendant's promise."

Of course, if the parties did not intend to make the doing of the act a condition precedent to the payment, but the payment is to be made at a day certain which may be, and is intended to be, before the performance of the act for which the payment is to be made, an action may be brought for the money at or after the day named for its payment, and the party who is to make the payment is left to his remedy to enforce the performance of the act to be done by the other. Thus when parties enter into an agreement for the sale and purchase of land at a future day, the purchaser to pay certain instalments before that, and on that day the vendor to execute a deed of conveyance, and the purchaser to pay another instalment, and the balance at stated periods thereafter, and the parties bind themselves in a large sum, as a penalty, to perform these covenants, it was held, in an action by the vendor to recover this penalty, that the covenants relating to the instalments to be paid before the day for conveyance were independent, on which recovery could be had without alleging performance, but that as to the instalments to be paid on the day for conveyance, as well as to subsequent instalments, the covenants were dependent, and performance, or an offer of performance, was a condition precedent to the vendor's right of recovery, and therefore that the vendor could not recover these instalments without showing a tender of a deed on his part. *Bean v. Atwater*, 4 Connecticut, 3; 10 American Decisions, 91. *HOSMER*, Ch. J., delivering the judgment of the Court, said: "It is a primary and fundamental rule concerning contracts, that their construction must be according to the intention of the parties; and so paramount is this rule, that to such intention even technical words must give way. *Porter v. Shephard*, 6 T. R. 665; *Campbell v. Jones*, 6 id. 570; *Morton v. Lamb*, 7 id. 125; 1 W. Saund. 320 n.; *Gazley v. Price*, 16 Johnson (N. Y.), 267. When the inquiry is in relation to their dependence or independence, this is to be collected from the evident sense and meaning of the parties; and however transposed they may be in the covenants, their precedency must depend on the order of time in which the intent of the transaction requires their performance. *Jones v. Barkley*, 2 Doug. 684. If the language of a contract will admit of it, justice and general convenience incline to the construction of a simultaneous performance; but if a man will agree to pay his money before he has the thing for which he ought to pay it, and will rely upon his remedy, this is a law of his own making, and his agreement he ought to perform. On the other hand, Courts should carefully endeavor to avoid compelling a person to give credit when he did not intend it. *Thorpe v. Thorpe*, 1 Ld. Raym. 666." The learned Justice criticises the case of *Terry v. Duntze*, 2 H. Bl. 389 (1795), holding that if any money is to be paid before the consideration is to be performed, the covenants are mutual and independent. This decision was at first recognized in New York: *Seers v. Fowler*, 2 Johnson (N. Y.), 272; *Havens v. Bush*, ib. 387; but the decision was afterwards regarded as a departure from principle, and the cases following it were overruled: *Cunningham v. Morrell*, 10 Johnson (N. Y.), 203; 6 Am. Dec. 332. Chief Justice KENT in this case said: "The parties have a right to mould their contracts so as to suit their mutual con-

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venience and interest: and when the Courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful." The rule of the leading case of *Pordage v. Cole* is not anywhere controverted, that where the entire consideration is payable at a fixed time, which either must or may precede the performance of the act on the other side, there may be a recovery of the sum payable without any performance by the plaintiff. "If, however, only a part of the money was to be paid before the conveyance of the land, and the residue afterwards, there is no exhibition of an intent that the whole consideration might be demanded before performance on the other side, but of the contrary." *Bean v. Atwater*, 4 Connecticut, 3, 11; 10 Am. Dec. 91, 94, per HOLMES, Ch. J.

Mr. Platt, in his work on Covenants, formulates the following propositions regarding dependent covenants, pp. 80-96: —

"I. Where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other." See also *McCullough v. Cox*, 6 Barbour (N. Y.), 386; *McLaughlin v. Hutchins*, 3 Arkansas, 207; *Houston v. Spruance*, 4 Harrington (Delaware), 117; *Parker v. Parmele*, 20 Johnson (N. Y.), 130; *Dakin v. Williams*, 11 Wendell (N. Y.), 67.

"II. When a day certain is appointed for the payment of the money, if the said day is to occur after the time in which the consideration ought to be performed for which the money is made payable, the performance of the consideration is a condition precedent to the payment of the money, and ought to be averred in an action brought for the money." And see *Edgar v. Boies*, 11 Sergeant & Rawle (Penn.), 445; *Howe v. Mitchell*, 17 Maine, 85; *Keenan v. Brown*, 21 Vermont, 86; *Putnam v. Mellen*, 34 New Hampshire, 71.

"III. Where mutual covenants go to a part only of the consideration on both sides, and where a breach may be paid for in damages, the defendant has a remedy on his covenant, and shall not plead it as a condition precedent." And see *Ritchie v. Atkinson*, 10 East, 295; *Stavers v. Curling*, 3 Bing. N. C. 355; *Robb v. Montgomery*, 20 Johnson (N. Y.), 15; *Grant v. Johnson*, 5 New York, 247; *Day v. Essex County Bank*, 13 Vermont, 97; *Nelson v. Oren*, 41 Illinois, 18.

"IV. If a day be appointed for the payment of money, and the day comes before the thing for which the money is to be paid can be done, then, though the agreement be to pay the money for the doing of the thing, yet an action may be brought for the money before the thing is done, because the agreement is positive that the money shall be paid at the appointed day, and it is presumed that the party intended to rely on his remedy, and not to make the performance a condition precedent." And see *Couch v. Ingersoll*, 2 Pickering (Mass.), 292; *Babcock v. Wilson*, 17 Maine, 372; *Grant v. Johnson*, 5 New York, 247; *Seers v. Fowler*, 2 Johnson (N. Y.), 272; *Wilcox v. Ten Eyck*, 5 Johnson (N. Y.), 78; *Cunningham v. Morrell*, 10 Johnson (N. Y.), 203; *King Philip Mills v. Slater*, 12 Rhode Island, 82, 86; *Bollman v. Burt*, 61 Maryland, 415; *Roach v. Dickinson*, 9 Grattan (Virginia), 154; *McCoy v. Birbee*, 6 Ohio, 310; *Morton v. Lamb*, 7 T. R. 125; *Bailey v. Clay*, 4 Randolph (Virginia), 346; *Bean v. Atwater*, 4 Connecticut, 3.

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The rules on this subject are of use chiefly as aiding in determining the intention of the parties when this is implied in any particular case: for the question whether covenants are dependent or independent is to be determined in accordance with the expressed intention of the parties and the common sense of each particular case. *Stavers v. Curling*, 3 Bing. N. C. 355, per TINDAL, Ch. J.; *Todd v. Sumner*, 2 Grattan (Virginia), 167; *Hunt v. Tibbets*, 70 Maine, 221; *Sewall v. Wilkins*, 14 Maine, 168; *McCrelish v. Churchman*, 4 Rawle (Penn.), 26; *Tompkins v. Elliot*, 5 Wendell (N. Y.), 496; *Johnson v. Reed*, 9 Massachusetts, 78; *Gardiner v. Corson*, 15 Massachusetts, 500; *Howland v. Leach*, 11 Pickering (Mass.), 151; *Larimore v. Tyier*, 88 Missouri, 661.

Where covenants are once established to be independent, they remain so. *Evans v. Harris*, 19 Barbour (N. Y.), 416.

In determining whether a covenant or a stipulation is dependent or independent, the whole instrument should be considered together, and reference should be had to its objects and purposes. *Cadwell v. Blake*, 6 Gray (Mass.), 402, 407; *Howland v. Leach*, 11 Pickering (Mass.), 151; *Knight v. New England Worsted Co.*, 2 Cushing (Mass.), 271; *Reed v. Jones*, 133 Massachusetts, 116, 119. In *Cadwell v. Blake*, *supra*, Chief Justice SHAW said: "In construing a mutual agreement, in which there are several stipulations on both sides, the question whether one is absolute and independent, or conditional and made to depend on something first to be done on the other side, does not depend on any particular form of words, or upon any collocation of the different stipulations; but the whole instrument is to be taken together, and a careful consideration had of the various things to be done, to decide correctly the order in which they are to be done."

When the payments under a mutual contract are to be made by instalments before the closing of the transaction, the covenants for the payment of the instalments are independent although the covenant for the last payment may be dependent, as where the last payment is to be made when the contract is to be completed by a conveyance or other act. *Babcock v. Wilson*, 17 Maine, 372; *Grant v. Johnson*, 5 New York, 247; *Seers v. Fowler*, 2 Johnson (N. Y.), 272; *Wilcox v. Ten Eyck*, 5 Johnson (N. Y.), 78; *Champion v. White*, 5 Cowen (N. Y.), 509; *Biddle v. Coryell*, 18 New Jersey Law, 377; *McMath v. Johnson*, 41 Mississippi, 439. The reason, of course, is that the payment of the instalments is to be made before the act is to be performed for which such instalments are the consideration; so that such act is not a condition precedent to such payments of the instalments. In such case the payment of an instalment may be exacted by the other party without showing or tendering a performance on his own part. The promise on the part of one to perform is a sufficient consideration for the stipulated payments to be made by the other party. *Babcock v. Wilson*, 17 Maine, 372. But the payment of an instalment may be made to depend upon some act to be done by the other party, and in that case such payment is, as respects that particular instalment, a dependent covenant.

Where one covenants with the owner of land that he will purchase the land and will pay therefor a certain sum in four years with interest annually, and the landowner covenants that he will deliver to the other party a convey-

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ance of the land, upon his paying the said sum in the manner agreed, the landowner may recover the interest at the end of each of the first three years; but he cannot recover the fourth year's interest, nor the principal sum, without tendering a deed of the land. *Gardiner v. Corson*, 15 Massachusetts, 499; *Kane v. Hood*, 13 Pickering (Mass.), 281; *Dakin v. Williams*, 11 Wendell (N. Y.), 67, 71.

When the covenants are mutual and the acts of performance by each party are to be concurrent, and no place is agreed for the performance, there is nothing to be done by either which must precede any action by the other. "Upon such an agreement, if both parties remain inactive, there is no breach by either. If either would charge the other upon it, he must put him in default. He must show a refusal by the other party to perform, or some act or neglect on his part which may be regarded as equivalent to a refusal. Unless excused from performance on his own part, by the refusal of the other party to perform, or some conduct equivalent to a refusal, he must show that he has offered to perform his part of the agreements; or at least that he gave notice of his readiness to perform, or, being thus ready, requested performance by the other party. Failing to do that, he cannot charge the mere neglect of the other party to take any action, as a refusal to perform, or as a breach of the agreement." *Hapgood v. Shaw*, 105 Massachusetts, 276, 279, per WELLS, J.; *Carpenter v. Holcomb*, 105 Massachusetts, 280; *Palmer v. Sawyer*, 114 Massachusetts, 1, 13; *Daniels v. Newton*, 114 Massachusetts, 530; *Tinney v. Ashley*, 15 Pickering (Mass.), 546; *Hunt v. Livermore*, 5 Pickering (Mass.), 395; *Couch v. Ingersoll*, 2 Pickering (Mass.), 292; *Brown v. Gammon*, 14 Maine, 276; *Clark v. Weis*, 87 Illinois, 438; *Smith v. Lewis*, 24 Connecticut, 624; 26 *id.* 110; *Zents v. Legnard*, 70 Pennsylvania State, 192.

An action for the breach of a written agreement to purchase land, brought before the expiration of the time given for the purchase, cannot be maintained by proof of an absolute refusal on the defendant's part ever to purchase. *Daniels v. Newton*, 114 Massachusetts, 530, 533. WELLS, J., delivering judgment, said: "A renunciation of the agreement, by declarations or inconsistent conduct, before the time of performance, may give cause for treating it as rescinded, and excuse the other party from making ready for performance on his part, or relieve him from the necessity of offering performance in order to enforce his rights. It may destroy all capacity of the party, so disavowing its obligations to assert rights under it afterwards, if the other party has acted upon such disavowal. But we are unable to see how it can, of itself, constitute a present violation of any legal rights of the other party, or confer upon him a present right of action. An executory contract ordinarily confers no title or interest in the subject-matter of the agreement. Until the time arrives when, by the terms of the agreement, he is or might be entitled to its performance, he can suffer no injury or deprivation which can form a ground of damages. There is neither violation of right, nor loss upon which to found an action. The true rule seems to us to be that in order to charge one in damages for breach of an executory personal contract, the other party must show a refusal or neglect to perform, at a time when and under conditions such that he is or might be entitled to require performance."

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If under a contract for the sale and purchase of land the vendor tenders a deed which is insufficient to convey a good title, and the purchaser refuses to accept it on that ground, no formal tender by him of the purchase-money or a request to the vendor is necessary, to enable him to maintain an action for a portion of the purchase-money paid at the time of the agreement. He is not bound to pay the purchase-money and accept the deed tendered and leave the vendor to clear up the defects with the aid of the purchase-money. *Gordley v. Kyle*, 137 Massachusetts, 189.

Where the agreement was that one as an executor should convey certain land within four months from the date of the agreement, and that the other party should accept and pay for the land within that time, it appeared that the latter made an arrangement within that time for a loan of money necessary to enable him to perform his part of the contract, and informed the vendor of this; but he made no tender of the money, and he had not actually prepared himself to perform presently his part of the contract. The vendor took no action to enable him to sell the land until after expiration of the four months, when he obtained a license from the Probate Court authorizing him to sell the land, and he then sold it to a third person. In an action by the proposed purchaser for a breach of the agreement, it was held that the action could not be maintained. Here both parties remained inactive, in the eye of the law. What the plaintiff did by way of arranging for the money was merely preliminary, and was not sufficient to give him a right of action. *Brown v. Davis*, 138 Massachusetts, 458; *Smith v. Boston & Maine R. R. Co.*, 6 Allen (Mass.), 262; *Frazier v. Cushman*, 12 Massachusetts, 277.

If one party to a mutual contract for a sale or exchange of land repudiates the contract or conveys the land to a third person, so that it is not possible for him to fulfil the contract, the other party who is in no default may recover for a breach of the contract without showing any tender of performance on his own part: and it is no defence to his action that he has not shown that he was able to pay the money which the contract calls for. *Lowe v. Harwood*, 139 Massachusetts, 133; *Carpenter v. Holcomb*, 105 Massachusetts, 280.

A purchaser of land to be conveyed free from incumbrances, who absolutely refuses to take any deed of the same or to accept performance of the contract of sale, cannot afterwards, in an action for the breach of his agreement to purchase, avail himself of any defect in the deed tendered, or of the fact that a mortgage upon the land was not discharged. *Wells v. Day*, 124 Massachusetts, 38; *Daniels v. Newton*, 114 Massachusetts, 530, 533.

A stipulation in a contract for the sale of land that at a time specified, if the purchaser desires it, the vendor will repay the purchase-money, is an independent covenant, which may be enforced without a tender of a reconveyance of the property. *Eno v. Woodworth*, 4 New York, 249; 53 Am. Dec. 370.

NEGLIGENCE.

SECTION I. Negligence Generally.

SECTION II. Special Circumstances implying Liability.

SECTION III. Employer's Liability.

SECTION IV. Contractors.

SECTION V. Contributory Negligence.

SECTION VI. Collision of Ships.

SECTION I. — *Negligence Generally.*

No. 1. — BLYTH v. THE BIRMINGHAM WATERWORKS COMPANY.

(1856.)

RULE.

To constitute negligence as a ground of legal liability, there must be the omission to do something that a reasonable man would do, or the doing of something which a reasonable man would not do.

Blyth v. The Birmingham Waterworks Company.

11 Exch. 781-785 (s. c. 25 L. J. Ex. 212; 2 Jur. (N. S.) 333).

Negligence. — Omission.

A water company having observed the directions of the Act of Parlia- [781]
ment in laying down their pipes, is not responsible for an escape of water
from them not caused by their own negligence.

The fact that their precautions proved insufficient against the effects of a
winter of extreme coldness, such as no man could have foreseen, is not sufficient
to render them liable for negligence.

Fire-plugs properly constructed having been inserted as safety-valves in
these pipes, in pursuance of their Act: *Scmble*, per BRAMWELL, B., that the
company are not liable for not removing accumulations of ice in the streets over
such plugs.

This was an appeal by the defendants against the decision of
the Judge of the County Court of Birmingham. The case was

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tried before a jury, and a verdict found for the plaintiff for the amount claimed by the particulars. The particulars of the claim alleged, that the plaintiff sought to recover for damage sustained by the plaintiff by reason of the negligence of the defendants in not keeping their water-pipes and the apparatus connected therewith in proper order.

The case stated that the defendants were incorporated by Stat. 7 Geo. IV. c. 109, for the purpose of supplying Birmingham with water.

By the 84th section of their Act it was enacted, that the company should, upon the laying down of any main-pipe or other pipe in any street, fix, at the time of laying down such pipe, a proper and sufficient fire-plug in each such street, and should deliver the key or keys of such fire-plug to the persons having the care of the engine-house in or near to the said street, and cause another key to be hung up in the watch-house in or near to the said street. By sect. 87, pipes were to be eighteen inches beneath the surface of the soil. By the 89th section, the mains were at all times to be kept charged with water. The defendants derived no profit from the maintenance of the plugs distinct from the general profits of the whole business, but such maintenance was one of the conditions under which they were permitted to exercise the privileges given by the Act. The main-pipe opposite the house of the plaintiff was more than eighteen inches below the surface. The fire-plug was constructed according to the best known system, and the materials of it were at the time of the accident sound and in good order. The apparatus connected with the fire-plug was as follows: -

[* 782] *The lower part of a wooden plug was inserted in a neck, which projected above and formed part of the main. About the neck there was a bed of brickwork puddled in with clay. The plug was also enclosed in a cast iron-tube, which was placed upon and fixed to the brickwork. The tube was closed at the top by a moveable iron stopper having a hole in it for the insertion of the key, by which the plug was loosened when occasion required it.

The plug did not fit tight to the tube, but room was left for it to move freely. This space was necessarily left for the purpose of easily and quickly removing the wooden plug to allow the water to flow. On the removal of the wooden plug the pressure upon

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the main forced the water up through the neck and cap to the surface of the street.

On the 24th of February, a large quantity of water, escaping from the neck of the main, forced its way through the ground into the plaintiff's house. The apparatus had been laid down 25 years, and had worked well during that time. The defendants' engineer stated, that the water might have forced its way through the brickwork round the neck of the main, and that the accident might have been caused by the frost, inasmuch as the expansion of the water would force up the plug out of the neck, and the stopper being incrustated with ice would not suffer the plug to ascend. One of the severest frosts on record set in on the 15th of January, 1855, and continued until after the accident in question. An incrustation of ice and snow had gathered about the stopper, and in the street all round, and also for some inches between the stopper and the plug. The ice had been observed on the surface of the ground for a considerable time before the accident. A short time after the accident, the company's turncock removed the ice from the stopper, took out the plug, and replaced it.

The Judge left it to the jury to consider whether the company had used proper care to prevent the accident. He thought that, if the defendants had taken out the ice adhering to the plug, the accident would not have happened, * and left it to [* 783] the jury to say whether they ought to have removed the ice.

The jury found a verdict for the plaintiff for the sum claimed.

Field, for the appellant. — There was no negligence on the part of the defendants. The plug was pushed out by the frost, which was one of the severest ever known.

The Court then called on

Kennedy, for the respondent. — The company omitted to take sufficient precautions. The fire-plug is placed in the neck of the main. In ordinary cases the plug rises and lets the water out; but here there was an incrustation round the stopper, which prevented the escape of the water. This might have been easily removed. It will be found, from the result of the cases, that the company were bound to take every possible precaution. The fact of premises being fired by sparks from an engine on a railway is evidence of negligence. *Piggott v. Eastern Counties Railway Company*, 3 C. B. 229; *Aldridge v. Great Western Railway Company*, 3 M. & Gr. 515; 4 Scott (N. R.), 156; 1 Dowl. (N. S.) 247.

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[MARTIN, B. — I held, in a case tried at Liverpool, in 1853, that, if locomotives are sent through the country emitting sparks, the persons doing so incur all the responsibilities of insurers: that they were liable for all the consequences. See *Lambert v. Bessey*, T. Rayn. 422; *Scott v. Shepherd*, 3 Wils. 403. Probably, an action of trespass might have been brought. I invited counsel to tender a bill of exceptions to that ruling. Water is a different matter.] It is the defendants' water, therefore they are bound to see that no injury is done to any one by it. An action has been held to lie for so negligently constructing a hayrick at the extremity of the owner's land, that, by reason of its spontaneous ignition, his neighbour's house was burnt down. *Vaughan v. Menlove*, 3 Bing. [* 784] N. C. 468 (No. 7, p. 715, *post*). * [BRAMWELL, B. — In that case discussions had arisen as to the probability of fire, and the defendant was repeatedly warned of the danger, and said he would chance it.] — He referred to *Wells v. Ody*, 1 M. & W. 452. [ALDERSON, B. — Is it an accident which any man could have foreseen?] A scientific man could have foreseen it. If no eye could have seen what was going on, the case might have been different; but the company's servants could have seen, and actually did see, the ice which had collected about the plug. It is of the last importance that these plugs, which are fire-plugs, should be kept by the company in working order. The accident cannot be considered as having been caused by the act of God. *Sjordet v. Hall*, 4 Bing. 607 (29 R. R. 651).

ALDERSON, B. — I am of opinion that there was no evidence to be left to the jury. The case turns upon the question, whether the facts proved show that the defendants were guilty of negligence. Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done. A reasonable man would act with reference to the average circumstances of the temperature in ordinary years. The defendants had provided against such frosts as experience would have led men, acting prudently, to provide against: and

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they are not guilty of negligence, because their precautions proved insufficient against the effects of the extreme severity of the frost of 1855, which penetrated to a greater depth than any which ordinarily occurs south of the polar regions. Such a state of circumstances constitutes a contingency against * which [* 785] no reasonable man can provide. The result was an accident, for which the defendants cannot be held liable.

MARTIN, B. — I think that the direction was not correct, and that there was no evidence for the jury. The defendants are not responsible, unless there was negligence on their part. To hold otherwise would be to make the company responsible as insurers.

BRAMWELL, B. — The Act of Parliament directed the defendants to lay down pipes, with plugs in them, as safety-valves, to prevent the bursting of the pipes. The plugs were properly made, and of proper material; but there was an accumulation of ice about this plug, which prevented it from acting properly. The defendants were not bound to keep the plugs clear. It appears to me that the plaintiff was under quite as much obligation to remove the ice and snow which had accumulated, as the defendants. However that may be, it appears to me that it would be monstrous to hold the defendants responsible because they did not foresee and prevent an accident, the cause of which was so obscure, that it was not discovered until many months after the accident had happened.

Verdict to be entered for the defendants.

ENGLISH NOTES.

The principal case may be compared with *Smith v. London & South Western Railway Co.* (No. 8, p. 726, *post*). The circumstances appear at first sight similar; and they are alike in so far as the exceptionally cold winter in the principal case, and the exceptionally dry season in the other, were equally beyond the reach of human foresight. But, in the principal case, it does not appear that when once the frost set in it was reasonably practicable for the company to avert the danger even if they could have foreseen it; whereas the danger of the dry heaps of inflammable material in the other case was obvious, and it may be presumed that the railway company unnecessarily aggravated the danger by leaving them so long.

The case of *Bailiffs of Romney Marsh v. Trinity House Corporation*.
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tion (1870), L. R. 5 Ex. 204, 39 L. J. Ex. 163, 22 L. T. 446, 18 W. R. 869 (affirmed Ex. Ch. L. R. 7 Ex. 247, 41 L. J. Ex. 106), is instructive. The defendants' vessel, by reason of negligent navigation, struck upon a shoal, and in consequence became unmanageable, and — by reason of a strong wind and the set of the tide — drifted to the shore against the plaintiffs' sea-wall. This collision caused damage to the wall; and further damage was caused by the vessel remaining there and bumping against the wall, while the cargo was being taken out. This was done with reasonable despatch, and the vessel was then broken up as the only means of preventing further damage. If the vessel had been broken up at once, in which case the cargo must have been sacrificed, the damage subsequent to the first collision would have been avoided. The Court held (1) that, — assuming that the shipowners were not responsible for negligence in letting the ship drift against the wall, the defendants were justified in saving the cargo, and were not responsible for the damage caused by the vessel being kept bumping against the wall; but (2) that the defendants' vessel having through the negligence of the captain and crew grounded on the shoal, the immediate effect of which was that the vessel became unmanageable, the negligence was the proximate cause of all that followed, and the defendants were responsible accordingly. This case was cited and followed in the case of *Gilbert v. Trinity House Corporation* (1886). 17 Q. B. D. 795, 56 L. J. Q. B. 85, 35 W. R. 30, where the servants of the corporation in removing a beacon under their powers, under the Merchant Shipping Act, 1854, had left an iron stump under water, which caused damage to the plaintiffs' ship. Here the fact of negligence, and that it was the proximate cause of damage, were obvious; and the point chiefly argued, though ineffectually, was that the defendants, the Trinity House Corporation, were in the position of servants of the Crown, and not legally responsible.

In India, the storage of water in tanks is part of an ancient system of irrigation, and by the custom of the country the zemindar or superior land-owner maintains such tanks for the use of himself and the inferior landholders. In an action for damage by the bursting of these tanks, it was proved that the tanks had been maintained in the same way as they had been, without any such accident, for twenty years past; that they were of the ordinary construction of such tanks and most of the Government tanks; and that, but for the extraordinary rainfall of the season, they would have been sufficient. On the other hand, it was suggested that a greater security would have been afforded by stone weirs, such as are used in some Government tanks. It was held by the High Court of Madras, affirming a decision of the acting Judge of the district, that the principle of *Fletcher v. Rylands* (see 1 R. C. 235),

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did not apply; that the defendant was not bound to avail himself of the last results of science, and was only responsible for negligence as defined by Baron ALDERSON in the principal case; and that of such negligence the facts afforded no evidence. This judgment was affirmed by the Judicial Committee of the Privy Council. *Madras Railway Co. v. Zemindar of Carvatenagarum* (1874), L. R. 1 Ind. App. 364.

In the case of *The European* (1885), 10 P. D. 99, 54 L. J. P. 61, 52 L. T. 868, 33 W. R. 937, the defendants were held responsible for negligence, a suggestion which, at first sight, appears subtle. A steamer on the Thames collided with and damaged a brig which was moored in a proper place. There was no fault on the part of the helmsman; but the steam-steering gear which was used had failed to act. There was a conflict of expert evidence as to whether the apparatus ought to have failed; but there was evidence that it had in fact failed under similar circumstances before. The Court held that after that experience the steam gear ought to have been disconnected and hand gear used in steaming up a crowded channel like the Thames, and the owners of the steamship were held responsible accordingly.

The Irish case of *Petrie v. Owners of the Steamship Restrevor* (1898), 2 Ir. R. 571, is another illustration of the rule. In the ordinary exercise of a public navigation, the defendants' steamer had run aground, in a place where the plaintiff had, rightly or wrongly, laid down oyster beds. In running aground, it was assumed that there was some negligence in the captain as regards his owners; but he did not know of the existence of the oyster beds. The oyster beds were damaged by the vessel taking the ground; and, although there was some evidence that, when the tide had ebbed, the captain of the vessel could have seen the oyster beds, they were further damaged by the working of the screw-propeller in getting the vessel off upon the flood tide. It was suggested in argument that, instead of using the screw-propeller, the captain might have got the vessel towed off by a tug, or warped off by hawsers. The Court held that there was no sufficient evidence of recklessness or negligence on the part of the captain, so as to render the defendants liable for the injury to the oysters. It was assumed in the judgments that, whether the oyster beds were laid down under licence of the navigation company, or were a mere trespass upon the bed of the navigable river, the defendants would be liable, if the captain of the vessel, after being aware of the oyster beds, injured them by recklessness or negligence; but it was also assumed that the rights of the plaintiff, whatever they were, were subject to the primary purposes of the navigation. Lord ASHBOURNE, C., as to the captain's duty under the circumstances, observed as follows: "The captain was

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entitled to get off his ship by any reasonable exercise of seamanship that his own knowledge might suggest. He was bound, I think, not to be reckless, or careless, or do unnecessary damage to the property in the oysters of any one; but within that, I am of opinion that he was entitled to do anything that he reasonably could to effect what was necessarily his primary object, and that was to get away his ship safely, according to his skill and judgment, exercising that skill and judgment *bonâ fide*, and fairly, avoiding, as far as he could, any reckless, negligent, or careless action that might be detrimental or dangerous to the oysters."

The cases No. 4, 5, and 6, *post*, and the notes there may be referred to in further illustration of the same principle.

AMERICAN NOTES.

Hutchinson v. Boston Gas Light Company, 122 Massachusetts, 219 (1877), furnishes a good illustration of the rule, where the injury is due to a cause which, in the exercise of ordinary prudence, could not have been foreseen and provided against by the defendant. The plaintiff was injured while escaping from a burning building in Boston the night after the great fire of November 9, 1872, while the fire was still burning, though under control. The fire in this particular building was caused by an explosion of gas, manufactured, sold, and distributed by the defendant, which had leaked from the pipes, in consequence of the fall of heavy buildings, the excessive heat, and other destructive agencies of the great fire. It was held that the evidence would not warrant a finding of negligence on the part of the defendant. Mr. Justice COLT, in delivering the judgment of the Supreme Judicial Court, said (page 221):

"It is urged that evidence is found in the failure of the defendant to guard against the effects of the fire of November 9th in deranging their system and destroying their pipes. But there is no rule of law which requires individuals or corporations to provide against an overwhelming calamity which, in the exercise of ordinary prudence, could not have been foreseen. There must be an omission to do something which a reasonable man, acting upon considerations which ordinarily regulate the conduct of human affairs, would do, or the doing something which such a man would not do. Probability of danger is to be taken into account, but not that which arises when the elements, with unprecedented power, overcome all ordinary restraints. We do not find any evidence that the defendant had not made suitable provision against the consequences of all conflagrations in the city, which past experience at that time indicated as necessary or prudent; or any evidence that the pipes from which the gas escaped were not of suitable material and properly laid; or that all appliances for the proper distribution or retention of gas were not fully provided; or that the officers and agents were not properly skilled; or that the works as a whole, with the system of management adopted, were not

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adequate to all the reasonable exigencies of the business. It was not shown that any other better system existed. The injury to the pipes and the leakage of gas was caused by the fall of heavy buildings, the excessive heat, and all the destructive agencies of the fire. *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781; *Holly v. Boston Gas Light Co.*, 8 Gray, 123."

In *Jager v. Adams*, 123 Massachusetts, 26 (1877), the plaintiff, while walking along a sidewalk in front of a building in process of erection, was injured by a brick falling upon him. The defendant was doing the mason work of the building under a contract, and had men at work laying bricks from the inside of the front wall at an upper story. The defendant had not provided any safe-guards or barriers to prevent bricks from falling upon passing travellers. There was no negligence on the part of the workmen in handling the bricks, and the fall of the brick which hit the plaintiff was purely accidental. It was held that the accidental fall of a brick under these circumstances was a danger which the defendant was bound to contemplate and provide against by safeguards or barriers, and that his omission to do so would warrant the jury in finding negligence on his part, for which the plaintiff could recover damages.

Further illustrations of the above rule may be found in *Gray v. Harris*, 107 Massachusetts, 492 (fresket); *Livingston v. Adams*, 8 Cowen (New York), 175 (mill-dam carried away); *Losee v. Buchanan*, 51 New York, 476 (explosion of a steam-boiler); *Brown v. Collins*, 53 New Hampshire, 442 (horse frightened by locomotive); *Pruitt v. Hannibal, &c. R. Co.*, 62 Missouri, 527 (unusual storm of snow); *Heazle v. Indianapolis, &c. R. Co.*, 76 Illinois, 501 (severe cold causing rails to break); *Topsham v. Libson*, 65 Maine, 449 (fresket); *Deford v. State*, 30 Maryland, 179; *Lapham v. Curtis*, 5 Vermont, 371; *Bohannan v. Hammond*, 42 California, 227 (action of tide).

No. 2. — *PURVES v. LANDELL.*

(H. L. APPEAL FROM SCOTLAND, 1845.)

No. 3. — *BEAL v. SOUTH DEVON RAILWAY COMPANY.*

(EX. CH. 1860, 1864.)

RULE.

THE duty required from a person who undertakes a service for reward is to provide the skill and use the care to be expected from persons generally who make such service their business. The want of such skill or care is "negligence" for which the undertaker is responsible; and the

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term "gross negligence," when used in connection with such a duty, is to be understood as "negligence" in the sense of the general rule.

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12 Clark & Fennelly, 91-108.

[91]

Negligence. — Attorney. — Law Agent.

An attorney or law agent is only responsible in damages to his client for gross ignorance or gross negligence in the performance of his professional services.

A declaration, or a summons against an attorney or a law agent, to recover damages for loss occasioned by his management of a cause, must charge gross ignorance or gross negligence, or must, at least, contain allegations of facts, from which the inference is inevitable that the defendant has been guilty of one or the other.

The law as to both these matters is the same in England and in Scotland.

THIS was a suit instituted by Landell to recover from Purves, who was a writer to the "Signet," compensation for the loss occasioned, as it was alleged, by his improperly conducting a previous suit, in which he had acted as law agent for Landell. The summons contained allegations to the following effect: Mark Landell, of Coldingham Hill, the uncle of the respondent, was, at the time of his death, which happened many years ago, proprietor of an estate in Jamaica and of the negroes on that estate. He left a widow, Margaret, and a daughter, Hannah Landell, him surviving. By the law of Jamaica, the widow was entitled to one-third of the estate in life-rent, and fee thereof being vested in the daughter, subject to the life-rent interest of her mother. Hannah Landell died on the 13th of March, 1833, and the respondent, who was her heir-at-law, then became entitled to the estate, subject to the life-rent of the widow. The compensation payable under the Slavery

Abolition Act, in respect of the negroes on the estate of [* 92] Mark Landell, amounted to £1,000, and * William Landell,

as his heir-at-law, asserted himself to be entitled to receive two-thirds of that sum, or £720, as soon as the compensation was awarded, and to have the remaining third invested for his ultimate benefit, but subject to the life-interest of the widow. The whole of the compensation money had been claimed in Jamaica by the widow, who was at the time resident there, and had been paid over to her. In July, 1836, she came to reside at the village of Ayton,

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in the county of Berwick; and William Landell then employed Purves as his professional agent, that he might, as such, advise and adopt what legal measures were necessary for making her amenable to the Scotch Courts, in order that he might recover from her the money, which he contended she had improperly received. Purves recommended an application for a border warrant to compel her appearance, and represented that this mode of procedure was proper and legal; and he, being a regularly licensed agent or procurator before the Sheriff Court of that county, Landell relied on the accuracy and correctness of his representations. Landell accordingly lodged the regular information with the sheriff clerk of Berwickshire; and Purves obtained a warrant in favour of Landell, to arrest the person and goods of Mrs. Landell “until she shall find sufficient caution acted in the Sheriff Court books of Berwickshire, that the debt due to Landell shall be made forthcoming as accords, and a domicile appointed within the jurisdiction of the said county of Berwick, at which she might be cited, and that as well *de judicio sisti* as *judicatum solvi*.” This warrant was signed by the sheriff clerk of Berwickshire. The fees usual on such warrants were paid by Landell. The warrant was executed, and Mrs. Landell gave the required caution, and appointed a domicile. Landell then instituted a suit against her in the Court of Session. She appeared thereto, and lodged, among other defences, a preliminary plea, to the effect that she, “being neither domiciled

* in Scotland, nor having any property or effects in it, is [*93] not within the jurisdiction of the Court of Session, and the irregular and illegal proceedings which were adopted to force her, the said defender, within the jurisdiction of the Scotch Courts, are altogether ineffectual for that purpose.” The LORD ORDINARY adopted this preliminary defence, and reported the case, with his opinion, to the Court of Session; and the Lords there, concurring with him, pronounced the proceeding to be irregular and void, and dismissed the suit with expenses. These expenses amounted to above £121, which Landell paid to Mrs. Landell, and £69, which he paid to his own agent. Mrs. Landell afterwards brought an action of false imprisonment against both Landell and the sheriff clerk, and recovered damages, as against the former, to the amount of £500 and, as against the latter, to the amount of £300. The summons in the present suit therefore prayed that Purves might be declared liable to make good to Landell the sums of money

which he had thus paid, or become liable to pay, in consequence of the irregularity of the warrant, together with the costs of this suit.

Purves, in addition to a defence on the merits, put in pleas in law, in which he contended that the summons did not set forth a legal cause of suit; that it only alleged that the proceedings had been held insufficient, but did not allege that he (Purves) had exhibited gross ignorance, or want of professional skill, or had departed from any established rule, or violated any acknowledged practice of the Court, or that he had been guilty of gross neglect in the conduct of the judicial proceedings against Mrs. Landell.

The case came before Lord COCKBURN, as the LORD ORDINARY, who being of opinion that the summons did not [*94] * present a relevant case for the relief sought, dismissed it with expenses. The cause was brought by a reclaiming note before the Lords of the second division of the Court of Session, who, by a decree of 27th May, 1842, altered this interlocutor, found the summons relevant, and remitted the cause to the LORD ORDINARY to proceed therein. *Landell v. Purves*, Court of Session, 2nd Series, Vol. 4, pp. 1300, 1543.

This was the decree appealed against.

The Lord Advocate and Mr. Turner, for the appellant. — A solicitor is not responsible for the failure of a case intrusted to his management when he pursues the ordinary and accustomed course in the conduct of it, nor is he liable except for gross ignorance or negligence. *Baillie v. Chandless*, 3 Camp. 17 (13 R. R. 738). To make him liable, there must be either a manifest want of skill, or great negligence. Neither of these is charged here. The summons here does not, upon the facts stated, raise the question of negligence, or of want of skill; yet it ought to do so, and it ought to set forth all the facts that are material to constitute the ground of action. This want of a sufficient allegation of a cause of action must have been felt in the Court below; for Lord MONCRIEFF, in his judgment, said, that if all the facts stated were found as stated, he doubted whether they would show a right to damages as against the agent. Court of Session, 2nd Series, Vol. 4, p. 1304. There is no allegation in this summons of gross negligence, nor of a want of ordinary skill. [THE LORD CHANCELLOR. — Upon that, the only question would be, whether, when a case of gross negligence is shown by the facts stated on the record, an allegation distinctly charging

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gross negligence is indispensable.] Here there is no statement of facts distinctly showing gross negligence. Without facts so *stated, it is clear that a direct allegation of gross negli- [* 95] gence is necessary. *Stuart v. Miller*, 3 Dunl. Bell, M. & D. 255, *Morrison v. Ure*, 4 Shaw & Dunl. 656, *Campbell v. Clason*, 1 Dunl. Bell, & Murr. p. 270, 2 Id., p. 1113, and *Donald v. Yeats*, 1 Dunl. Bell, & M. p. 1249, were all cases in which such an allegation was made, or the facts stated, raised, beyond all doubt, the charge of gross ignorance or negligence.

Mr. Kelly and Mr. Anderson, for the respondent. — This case depends on the form of Scotch pleading; and the question is not whether this summons discloses what in England we should call a cause of action, but whether the summons is sufficient according to the law of Scotland. The cases of *Stevenson v. Rowand*, 2 Dow & Clark, 104, and of *Lang v. Struthers*, 2 Wils. & Shaw, 563, Fac. Coll. 2 Feb., 1826, show that the rules of pleading are not the same in the two countries, and that the same strictness which we require here is not necessary there. [THE LORD CHANCELLOR. — Independently of the question of pleading, I am not able to understand how the law of Scotland and of England can, upon this subject, be different from each other, when you advert to the principle stated by Lord MANSFIELD, in *Pitt v. Vaden*, 4 Burr. 2060, namely, that “an attorney ought not to be liable in cases of reasonable doubt,” as that on which his liability is to rest. Do you mean to say, that for every mistake committed by an attorney in the conduct of a cause, his client may claim damages?] The argument is not meant to be carried quite to that extent, but still it is clear that an attorney may be responsible even for the damage occasioned by the loss of the subject matter of the suit, or of any other proceeding where such loss has been the result of his ignorance or *negligence. *Bulkely v. Wilford*, 2 Cl. & Fin. [* 96] 102 (37 R. R. 39); *Donaldson v. Haldane*, 7 Cl. & Fin. 762. But at all events it is clear that there is a distinction between the right of a client to claim damages in respect of money which he might have obtained but for the error on the part of the attorney, and his right to recover back the costs which, as a consequence of that error, he has been compelled to pay to the opposite party. The money out of pocket, he must be entitled to recover. [Lord BROUGHAM. — That is to say, that the attorney may not be held to have guaranteed the success of the suit, but must be held to have

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guaranteed the costs out of pocket. THE LORD CHANCELLOR. — The injury being the same, though assuming different shapes and forms.] That does seem to be so, but the identity is in appearance only. The two things are perfectly distinct from each other. In *Graham v. Alison*, 9 Shaw & Dunl. 130, it was held that an agent who had mistaken his course of proceeding, but had followed the usual practice in the case which was intrusted to him, could not be held responsible for the damage occasioned by the loss of the subject matter of the suit, but was responsible for the expenses which had been incurred. That shows that the decision here is not to be governed by the rules of English law, and establishes the distinction already contended for, because there, Mr. Alison, the attorney, though not held bound to make good the loss of the subject matter of the suit, was held bound to restore the money which he had received. That decision was affirmed in this House. 6 Wils. & Shaw, 518. [Lord CAMPBELL. — But what do you say upon the point of pleading? Do you say that it is sufficient to state facts which may amount, if proved, to gross negligence, without in form alleging that there has been gross negligence?] The respondent is bound to maintain that argument, and the [*97] case of *Stevenson v. *Rowland*, 2 Dow. & Clark. 104, warrants him in doing so, and so does *Hart v. Frame*, 4 Cl. & Fin. 193, for in those cases there was no direct allegation of gross negligence or want of ordinary professional skill. In *Wood v. Fullarton*, 1710 Nov. 28, Morr. 13960, a writer employed to raise horning and caption, was held liable to his client, against whom the debtor had brought an action, because the messenger denounced the debtor before the lapse of six days. It is clear, therefore, that where there has been something done, even by the authorised agent of the writer, which induces a damage to the client, the latter may recover such damages against the writer. The law agent will not be protected, even where he has pursued the usual course, should that course turn out to be erroneous, and to occasion damage to his client. *Hart v. Frame*, 4 Cl. & Fin. 193. The statement of the facts which constitute the misconduct of the agent, and show his negligence or want of skill, is sufficient, without a formal allegation that he has been guilty of misconduct. Such an allegation would be useless without the statement of the facts; and the mere absence of that allegation cannot defeat the party's right to recover, when the facts themselves are clearly set forth. They

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are clearly set forth here, and the judgment of the Court below must be sustained.

LORD BROUGHAM. — My Lords, in this case, I move your Lordships to proceed to reverse the interlocutor of the Court below, without hearing the learned counsel for the appellant in reply. I never saw a case which stood, in my opinion, upon clearer grounds. The learned Judges of the Court below were very much divided in opinion upon this case. It is a great mistake to represent it as one in which there was no very great difference of opinion; Lord COCKBURN clearly expressing an opinion against this action, and the LORD *ORDINARY (Lord JEFFREY) leaning the [*98] same way. Lord MONCRIEFF, too, went a great deal further than merely expressing a doubt or an inclination of opinion, because Lord MONCRIEFF's opinion upon the very point, the main point and pivot upon which this case turns, was that the Court was wrong, and he differed with the Court, and thought that there ought to have been on the record an allegation of negligence.

My Lords, I apprehend it to be by no means a technical question, depending upon the rules of pleading; it is of the very essence of this kind of action that it depends, not upon the party having been advised by a solicitor or attorney in a way in which the result of the proceeding may induce the party to think he was not advised properly, and may, in fact, prove the advice to have been erroneous; not upon his having received, if I may so express it in common parlance, bad law, from the solicitor; nor upon the solicitor or attorney having taken upon himself to advise him, and, having given erroneous advice, advice which the result proved to be wrong, and in consequence of which error, the parties suing under that mistake were deprived and disappointed of receiving a benefit. But it is of the very essence of this action that there should be a negligence of a crass description, which we call *crassa negligentia*, that there should be gross ignorance, that the man who has undertaken to perform the duty of an attorney, or of a surgeon, or an apothecary (as the case may be), should have undertaken to discharge a duty professionally, for which he was very ill qualified, or, if not ill qualified to discharge it, which he had so negligently discharged as to damnify his employer, or to deprive him of the benefit which he had a right to expect from the service. That is the very ground Lord MANSFIELD has

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laid down in that case (*Pitt v. Yalden*, 4 Burr. 2060) to [* 99] which my noble and learned *friend on the woolsack has referred a little while ago, and which is also referred to in the printed papers. It was still more expressly laid down by Lord ELLENBOROUGH in the case of *Baile v. Chandless*, 3 Camp. 17 (13 R. R. 738), because there Lord ELLENBOROUGH uses the expression, "an attorney is only liable for *crassa negligentia*;" therefore, the record must bring before the Court a case of that kind, either by stating such facts as no man who reads it will not at once perceive, although without its being alleged in terms, to be *crassa negligentia* — something so clear that no man can doubt of it; or, if that should not be the case, then he must use the very averment that it was *crassa negligentia*.

I will not go so far as to say that, if it were for some very gross case, such, for instance, as a man advising his client that his oldest legitimate son was not his heir-at-law, — or any other thing which, upon the face of it, shows gross ignorance of the A. B. C. of his profession, and the most crass negligence in the performance of his professional duty, — in such a case, it is not necessary to go so far as to say, that that would not be equivalent to that which is wanting here, namely, an averment, in terms, of impropriety, of breach of professional duty, or want of sufficient knowledge, or gross and crass negligence. It is not necessary to proceed upon that supposition, nor to decide whether in England or in Scotland a declaration or a summons, in a form like the present, would or would not, in such a case, be sufficient; for aught I know, it might; but that is not the case here. It is merely set forth, that a border warrant was issued; and it is further stated, that a personal damnification took place. That is all. There is no statement of the facts, which at once explains itself, so that he who runs may read. Nor is there a statement in terms that there was gross negligence.

The case is wholly a blank upon these two matters, one [* 100] * or other of which ought to appear on the record, otherwise the action does not lie.

Now that being the case, I cannot go into the alarming doctrine laid down by the Lord Justice CLERK, *Landell v. Purves*, Court of Session, 2 Series, Vol. 4, p. 1303, as to a supposed distinction between error in cases where the liberty of the subject is concerned, and cases of a different kind, which I hold to be quite erroneous, and which I think is not accurately reported. It is said it is unneces-

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sary to allege that Mr. Purves was guilty either of want of skill or of negligence; it is enough to allege that what he had done was a nullity.

Now the mere allegation and proof of such a fact as that could never be sufficient; because, unless a great deal more is proved, you may just as well say that in every nonsuit, or every action that failed, or every case in which what is called an infructuous proceeding has taken place, even though the attorney should really be successful in the case, yet that, should there not be a beneficial result from the action, that circumstance alone would make the attorney liable. No man can possibly conceive that such is the liability of an attorney. There must be considerable mismanagement, considerable ignorance, and the absence of attentive conduct in general: unless it is gross, the law holds that it is sufficient.

It is said there are such cases here; the case in *Morrison's Reports*, *Wood v. Fullarton*, *Morr.* 13960, and others, and the case before this House in 1838, *Hart v. Frame*, 6 Cl. & Fin. 193, in which it is said there was no such clear averment; and it was argued that, although the negligence may not be sufficiently proved to entitle the complaining party to damages, it has been sufficiently proved to entitle him to the restitution of the money paid; that there is something different between the proceedings in

* England and Scotland in those respects. That is not the [* 101] case; but if it was so, the argument would only go to show that, because there is a difference in one respect, that therefore there must be a difference in the other, which is a very unsatisfactory mode of reasoning.

It is contended that Mr. Purves had notice of Lord JEFFREY'S interlocutor, which was against him, and that therefore he was bound to indemnify his client from the consequences of his having advised him, in the teeth and in the face of that interlocutor, to reclaim to the Inner House. It would be his bounden duty to advise him not to rest satisfied with the first unfavourable opinion, and to see whether it was well founded. If it were not so, you might just as well say, that in every case in the Courts below where the decision is against a man, and from which he appeals here, that if it is affirmed upon appeal there is crass negligence, or at least a case entitling the party who has lost the appeal to an indemnity; because the man who was served with the notice in the course of the business was aware that there had been a

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decision against his client below, and therefore he ought to have known that his client could not succeed upon appeal. Such a doctrine never could be maintained.

I am of opinion, upon all these grounds, that there is no reason to support the interlocutor of the Court below, and that it must be reversed.

LORD CAMPBELL. My Lords, I am extremely sorry for the situation in which Mr. Landell is placed; but we must not be carried away by feelings of compassion, we must be bound by the principles of law, and upon those principles I have no doubt at all, that Lord COCKBURN and the LORD ORDINARY took a just view of this case, and that we are bound to sustain their decision.

Now what is the action we are to determine upon? It is [*102] an action in which William Landell complains that he, * having brought an action against Margaret Landell, and having retained Mr. Purves as his professional adviser, that in the proceeding of that action against Margaret Landell, Mr. Purves, his professional adviser, was guilty of misconduct, whereby an action was brought against him by Mrs. Margaret Landell, and damages and costs were recovered, which he was obliged to pay. What is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence, or with gross ignorance. It is only upon one or other of those grounds that the client can maintain an action against the professional adviser. And thus far it is quite unnecessary here to look at the case that has been referred to, which came on in the time of Lord MANSFIELD, because there the action was to recover back money which had been paid by the client to the professional adviser. It was a totally different proceeding from that which we have now to determine upon.

In an action such as this by the client against the professional adviser, to recover damages arising from the misconduct of the professional adviser, I apprehend there is no distinction whatever between the law of Scotland and the law of England. The law must be the same in all countries where law has been considered as a science. The professional adviser has never been supposed to guarantee the soundness of his advice. I am sure I should have been sorry when I had the honour of practising at the Bar of

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England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr. Justice HEATH, who said that it was a very difficult thing for a gentleman at the Bar to be called upon to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been *determined. Well then, this [* 103] may happen in all grades of the profession of the law.

Against the barrister in England, and the advocate in Scotland, luckily, no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable. It would be utterly impossible that you could ever have a class of men who would give a guarantee, binding themselves, in giving legal advice and conducting suits at law, to be always in the right.

Then, my Lords, as *crassa negligentia* is certainly the gist of an action of this sort, the question is, whether in this summons that negligence must not either be averred or shown? This is not any technical point in which the law of Scotland differs from the law of England. I should be very sorry to see applied, and I hope this House would be very cautious in applying, technical rules which prevail in England to proceedings in Scotland. But I apprehend that, in this respect, the laws of the two countries do not differ, and that the summons ought to state, and must state, what is necessary to maintain the action; this summons must either allege negligence, or must show facts which inevitably prove that this person has been guilty of gross negligence. Now, here it is not at all pretended that there is any allegation of negligence.

Then what is the fact shown from which negligence is necessarily to be inferred? Why, there is a warrant, which was sued out by Mr. Purves, or by his advice, against Margaret Landell, while she was living in Berwick, upon the borders of the kingdom of Scotland, she not being domiciled in Scotland, but being domiciled in England. * It was held, that, [* 104]

upon that ground, that warrant was void. It might have been subject to other objections, for anything I know to the contrary; but it was held void upon that ground, that she neither had property in Scotland nor effects in it, one of which circumstances was necessary *ad fundandam jurisdictionem*; nor was she domiciled in Scotland, and so was not liable to be sued in the Courts of Scotland. It was upon these grounds that the warrant was held to be insufficient, and that the action of Landell against Margaret Landell failed. Was that sufficient to make a case for an action against the attorney, when the question must be, was he guilty of negligence? It might have been proved that she had large property in Scotland. He might have been told that she had been domiciled in Scotland. He might have been told that she had been living so long away from England, that she had abandoned all thoughts of returning there, and had removed her household gods to Scotland, and represented that as her domicile. It is possible he might have been told that that was the fact, although it turned out that she was not domiciled in Scotland, and had no property in Scotland.

How then can we inevitably infer from the simple fact of the warrant being found bad, that Purves was guilty of gross negligence? He may have been; I know nothing one way or the other — it is not here alleged. If it had been, and he had denied it, then the issue would have been plain, and a trial before a jury could have taken place; and then the evidence would have shown whether he was guilty of negligence in suing out the warrant, or whether he had acted with due care and caution, and the warrant had turned out to be bad, notwithstanding all the care and caution he could exercise.

It seems to me, therefore, my Lords, that, upon principles as to which there can be no doubt, this summons is defective; [* 105] because it neither alleges what is necessary * to maintain the action, nor does it show facts that raise a necessary inference that any gross negligence did exist.

We were referred to a case to show that, by the law of Scotland, it is not at all necessary to allege in the summons that there has been negligence. But that was where there had been a clear breach of duty. The strongest case is that of *Stevenson v. Rowland*, 2 Dow & Clark, 104. Now, when we examine that case, as set out by the appellant in his printed papers, it appears that the

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ground of action was upon that summons abundantly set out; because the action was brought for the breach of a specific duty, which duty was set out upon the face of the summons. There is, upon the face of the summons, an allegation, "that Stevenson did not complete the said security in a legal manner, by obtaining from the superior any confirmation of the said land and disposition in security, or of the aforesaid instrument of sasine following thereon. That it was incumbent upon the said Nathaniel Stevenson to procure a legal and valid security for the said Henry Wardrop and the pursuer, so as to render it complete and effectual against all subsequent deeds and infeftments; and as the pursuer has sustained much loss, damage, and expense, in consequence of the said Nathaniel Stevenson not having drawn and completed the said heritable security in such form and manner as would have given the same priority, but in such form and manner as has postponed the same to a posterior security and burden, over the said lands and others, he is bound in law, justice, and equity, to free and relieve the pursuer from the loss, damage, and expense thereby occasioned."

Now what does that mean? It is a plain allegation that it was the duty of Stevenson to procure the security there stated to be framed in a particular manner, and that he had not procured it to be framed in that particular manner, whereby a loss had accrued to the party who *complained. Upon this it [*106] would have been the easiest thing in the world to frame an issue, whether it was incumbent upon Stevenson to do what was alleged, and whether he had failed in the discharge of his duty. But upon the summons here it would be impossible to frame any such issue; the only issue that could be framed has been framed by the clerk who discharges that duty. He has looked at the summons, and he has framed the best issue that the summons would admit of, and yet upon the face of it we find that the issue avers a finding in favour of the pursuer, which could not have been found by the special finding of the jury, for, although the warrant might have been wrong, he still might have acted with the greatest care.

There is no attempt whatever to show that in such an action, by the practice of the law of Scotland, it is not necessary for a man to allege negligence, or to show facts from which negligence must inevitably be inferred. As to the distinction supposed to have

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been taken by the Lord Justice CLERK (4 Bell. Murr. & D. 1303) between "a warrant that affects the liberty of the subject, and any ordinary matter of business in which an agent may be employed:" it appears to me, as well as to my noble and learned friend, that that learned and most laborious Judge must have been inaccurately reported with respect to that distinction; because, if the report is accurate, it seems that upon all other actions negligence must be alleged, but that when there is any proceeding that touches the liberty of the subject, then, without any allegation of negligence, the professional adviser is liable, if there has been any mistake. Now, it is enough to say that there is no authority for that distinction in the law of Scotland, and there seems to me to be no principle to warrant it, and there being neither principle nor authority, and it having been abandoned by the counsel for the [*107] respondent, I should not say a word about it, * except that it seems to me that there must have been some mistake in the report, because, although some proceeding may have taken place, whereby the liberty of the subject may be affected in the course of a judicial proceeding, yet no one could be liable but the professional adviser; and he cannot, unless he has been guilty of some negligence, as he does not guarantee the correctness of the advice which he gives.

On these grounds, my Lords, I think the reasoning of the LORD ORDINARY, in his note, is perfectly satisfactory, and I regret that it came before the Second Division of the Inner House, and that when there Lord MONCRIEFF's doubt or opinion did not prevail. I regret that there has been this distinction attempted to be made, because the distinction does not rest upon principle or authority; and, therefore, I apprehend that this interlocutor of the Second Division must be reversed, and that the interlocutor of the LORD ORDINARY should be affirmed. And I presume that now the judgment of this House should be that Mr. Purves be assailed from the conclusion of the summons, and the interlocutor be recalled.

The LORD CHANCELLOR. — My Lords, I am of the same opinion that has been expressed so fully and ably by my noble and learned friends in this case. It is quite unnecessary for me, after the detailed manner in which they have adverted to the particular facts of the case, to go over the same ground. I shall, therefore, state, in a very few words, the principle upon which I think this

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question ought to be decided, and, in fact, it is nothing more than a repetition of what has been stated by my two noble and learned friends.

It is quite clear that the summons must state a sufficient cause of action. When an action is brought against a solicitor, he is liable merely in cases where he has shown a want of reasonable skill, or where he has been guilty of *gross [*108] negligence. The summons, therefore, I apprehend, must state either a case of gross negligence, or a case of breach of duty. Now it is quite clear in this case, that upon the summons, there is no positive statement of any want of reasonable skill, nor any express statement of negligence; and I am of opinion that, upon the other facts stated in the summons, there is nothing equivalent to this averment. It follows therefore that the summons in this respect is defective, and I think that the interlocutor of the Court below ought to be reversed.

(Ordered and adjudged, That the interlocutor of the 27th May, 1842, complained of in the said appeal, be reversed; and it is further ordered, that the case be remitted back to the Court of Session in Scotland, with directions to that Court to adhere to the interlocutor of the LORD ORDINARY, of the 19th of March, 1842, and to proceed further therein as shall be just and consistent with this judgment.)

Beal and Another v. South Devon Railway Company.

5 Hurl. & Norman, 875-889; 3 Hurl. & Colt. 337-343 (s. c. 29 L. J. Ex. 441).

Carrier. — Special Contract. — Negligence.

A railway company gave public notice that fish would only be conveyed [875] on their line by special agreement and by particular trains: and that the sender should sign certain conditions, as follows: "That the company should not be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of trains, exposure to weather, stowage, or from any cause whatever, other than gross neglect or fraud:" and they notified "that fish, under special conditions, would be conveyed by the 6.50 A. M., the 8.55 A. M., and other (named) trains, subject in all cases to the immediate convenience and arrangements of the company." These conditions having been signed by a person sending fish by the railway: *Held*, that they were just and reasonable conditions within the meaning of the 17 & 18 Vict. c. 31, s. 7, and that they constituted a valid contract binding upon the party who had signed them.

Declaration. — That the plaintiffs delivered to the defendants certain baskets containing fish, to be carried from Torquay to London, and there to be delivered to the plaintiffs within a reasonable time, for reward, &c.; and, in consideration thereof, the defendants promised the plaintiffs to carry and convey and deliver the said baskets and fish within a reasonable time; but though such reasonable time had elapsed, and everything had [*876] happened and been done *necessary, &c.; yet the defendants did not carry, convey, or deliver the same within a reasonable time. — There was a second count similar to the above.

Pleas. — First: *Non assumpsit*.

Secondly. — That the defendants did, within a reasonable time, carry, convey, and deliver the said baskets and fish.

Thirdly. — That the terms in the declaration mentioned were and are as follows, that is to say, that the said baskets and fish would only be carried, conveyed, and delivered, as in the declaration mentioned, by special agreement that the defendants should “not be responsible, under any circumstances, for loss of market,” &c. (setting out the conditions in the ticket hereinafter mentioned): that the breaches of promise in the declaration mentioned were the failure by the defendants to carry, convey, and deliver the baskets and fish for a small and inconsiderable space of time only, to wit, two hours; at the end of which time the same were duly carried, conveyed, and delivered to the plaintiffs; and that the loss did not in any way arise from, out of, or through gross neglect or fraud, but through unavoidable delay and detention of trains, and from causes other than gross neglect or fraud.

The plaintiffs took issue on the pleas.

At the trial, before MARTIN, B., at the last Devon Spring Assizes, the following facts appeared. — The plaintiffs, who were dealers in fish, had for many years been in the habit of sending fish to Billingsgate by the 6.13 p.m. train. This train preceded the mail train to Bristol, whence the fish was carried on by the mail train to Paddington. The defendants would, at all times, forward fish by the mail train from Torquay, on being paid 10s. a ton extra. In order to obtain a ready sale, it was necessary, as the defendants knew, that the fish should reach the market in proper time, and until the occasion in question, it had always done so. [*877] On the 20th * of October, 1859, 282 bushels of sprats, addressed to Messrs. Rous and Bacon, fish salesmen, Bil-

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lingsgate, and 267 bushels of sprats, addressed to Mr. Heck, fish salesman, Billingsgate, were delivered by the plaintiffs at the Tor station of the defendants' railway, to be carried to Paddington. The delivery of the sprats commenced about 1 P. M. The plaintiffs saw the station master, between two and three o'clock, and told him that a large quantity of fish was coming, and that he had not sufficient hands. The plaintiffs said, "If you detain the fish till the mail train, don't charge the 10s. per ton extra." All the baskets were delivered at the station before 5 o'clock, and in time to have been despatched by the 6.13 train. The plaintiffs' men assisted in loading the trucks. The plaintiffs paid for the carriage of the fish, and signed a receipt note, which was as follows : —

"SOUTH DEVON RAILWAY.

"Fish.

"The South Devon Railway Company hereby give notice, that fish will only be conveyed upon the railway by special agreement, and by particular trains, which are stated in the time bills of the company; also on the express condition that the sender or his agent shall, in delivering the fish at the company's station, or other place, when the same shall be loaded on the company's carriages, sign the order and declaration, a copy of which is subjoined, &c.

"By order of the Directors," &c.

"Fish, Fruit, and other Perishable Articles.

"The South Devon Railway Company, for themselves, and for the Great Western and Bristol and Exeter Railway Companies, give public notice, that neither of the said companies will undertake to convey fish, game, &c., or other perishable articles, over the said railways, or any of them, excepting under the general conditions published at the railway stations, in the time tables,

* or other notices of the said companies; and excepting [* 878] under the following special conditions, viz.: That neither of the said companies shall be responsible, under any circumstances, for loss of market, or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud. And also that the consignor shall sign the subjoined order and declaration, and that his signature thereto shall in all cases constitute his

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special agreement to abide by these conditions, and by the printed rules and regulations of the said companies," &c.

"Sender's Order and Declaration."

"185 .

"TO THE SOUTH DEVON RAILWAY COMPANY.

"Receive the under-mentioned goods from Mr. _____ of _____, to be conveyed, at the risk of the owner, by the South Devon Railway Company, subject to the above-mentioned notice, and generally to the terms and conditions specified in the public notices and time-tables of the company.

"Signed, _____, *Sender.*"

In the time-tables of the company was the following notification. — "Fish under special conditions will be conveyed by the 6.50, the 8.55 A.M. (and other named) trains, &c., subject in all cases to the immediate convenience and arrangements of the company," &c. One truck went by the 6.13 train. After that truck had left, the plaintiff Beal booked another truck and a horse-box by the mail train; but he did not pay the extra charge of 10s. a ton, and was not asked for it. The fish was sent by the mail train for the accommodation of the defendants, not of the plaintiffs. The plaintiffs telegraphed to the consignees, desiring them to have the proper conveyances to receive the fish at Paddington, and take it to Billingsgate. On the following day the plaintiffs forwarded 84

other baskets of fish to Messrs. Rous and Bacon, and 123 [*879] baskets to Heck. The consignees * gave notice to Y. & Co.,

who were the carriers for the defendants, to have the proper vans ready for the conveyance of the fish to market, where it should have arrived at 6 o'clock, but the fish sent on the 20th did not arrive by the mail train, and was not delivered in London till 10 o'clock. The fish sent on the 21st did arrive by the mail train, but that train was considerably after its time. The plaintiffs sustained a loss of £70. No evidence was given as to the cause of the delay.

At the close of the plaintiffs' case, the defendants' counsel submitted that the defendants were exonerated from liability, and were entitled to have a verdict entered for them upon the third plea. The plaintiffs' counsel submitted that the conditions signed

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by the plaintiffs were not just and reasonable; and the learned Judge being of that opinion, a verdict was entered for the plaintiffs, leave being reserved to the defendants to move to enter a verdict for them.

Montague Smith having obtained a rule *nisi* accordingly,

Collier and Carter showed cause (May 31 and June 6, 8). — The defendants, as common carriers, were bound to deliver the fish in London within a reasonable time: *Raphael v. Pickford*, 5 Man. & G. 551; therefore, unless that liability is qualified by the conditions signed by the plaintiffs, the declaration was proved. The conditions are unreasonable. The company gave notice that fish would only be carried on their railway by special agreement, and upon the express condition that the sender shall sign a declaration exempting the company from all liability for loss or injury, from any cause other than gross negligence or fraud. But, by the 17 & 18 Vict. c. 31, s. 2, the company are bound to carry fish or any other article without any special agreement; therefore this *condition is in contravention of the duty imposed upon [*880] them by that Act. The 3rd section says that the company shall be liable for injury occasioned by their neglect or default; but they compel the plaintiff to sign a contract limiting their liability to injury by gross neglect or fraud. They have no power to make such a contract. It is, in effect, a restraint on trade. *Wren v. The Eastern Counties Railway Company* (Q. B., Nov. 2, 1859. See *Harrison v. The London, Brighton, and South Coast Railway Company*, 29 L. J. (Q. B. 209) is an express authority that a railway company is liable for delay in delivering fish. The present case cannot be distinguished from *M'Manus v. The Lancashire and Yorkshire Railway Company*, 4 H. & N. 327, if the words "except for fraud or gross negligence" be struck out of the conditions signed by the plaintiffs. The word "fraud" makes no distinction, because in any case, whatever might be the conditions signed, a railway company would be liable for fraud. As to "gross negligence," it is practically impossible to decide what is gross negligence. [CHANNELL, B. — The plaintiffs should have given *prima facie* evidence of gross negligence. The declaration should have set out the terms on which the defendants agreed to carry the fish, and should have contained an averment that they were guilty of gross negligence.] Even assuming that the burden of proof on such an issue was on the plaintiffs, a delay of five hours

and upwards was evidence of gross negligence. In *Owen v. Burnett* (2 C. & M. 353, 360. POLLOCK, C. B., referred to *Wilson v. Brett*, 11 M. & W. 113), BAYLEY, B., points out that the "gross negligence" which throws upon the carrier the responsibility, when but for that he would be exempt under the 11 Geo. IV. & 1 Wm. IV. c. 68, amounts generally to misfeasance. If those words are so construed here, and these conditions held valid, the protection to the [*881] company would be the *same as in *M'Manus v. The Lancashire and Yorkshire Railway Company*, and consequently the conditions unreasonable. [POLLOCK, C. B. — There is a certain degree of negligence, to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.]

Montague Smith and Karslake, in support of the rule. — The conditions contained in the special agreement are reasonable. The contract must be construed with reference to the nature of the traffic. For the accommodation of the sender the company consent to carry the fish by a passenger train; but they give notice that they will only carry it upon certain conditions. The plaintiffs agreed to those terms, and having signed the contract they are bound by it. In *M'Manus v. The Lancashire and Yorkshire Railway Company*, 2 H. & N. 693; 4 H. & N. 327, the condition was not so reasonable as that in the present case. There the company gave notice that they would not be responsible for any injury or damage, howsoever caused; here the company limit their liability to injury from gross neglect or fraud. [POLLOCK, C. B. — There may be a difference between what is reasonable and unreasonable, according as the company are bound or not bound to carry. For instance, suppose a carrier is not bound to carry horses, might he not give notice that he would only carry them on certain terms?] A railway company is not bound to carry every description of goods, and between all places on their line, but only such goods, and to and from such places, as they have publicly professed to carry. *Johnson v. The Midland Railway Company*, 4 Ex. 367. This company not being bound to carry fish by passenger trains, was at liberty to make any con- [*882] tract they thought fit for that *purpose. In *Pardington v. The South Wales Railway Company*, 1 H. & N. 392, the company carried cattle upon condition of exemption from liability for injury from any cause whatsoever; and that was held reason-

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able. In *White v. The Great Western Railway Company*, 2 C. B. (N. S.) 7, the condition was, that the company would not, under any circumstances, be liable for loss of market or other claim, arising from delay or detention of any train; and that also was held a reasonable condition. Prior to the 17 & 18 Vict. c. 31, if a person wished to render a common carrier liable for refusing to carry goods, he ought to have tendered a reasonable sum for their carriage, and then have brought his action for the refusal to carry; if, instead of doing so, he signed a special contract, he was bound by it. *Carr v. The Lancashire and Yorkshire Railway Company*, 7 Ex. 707; *Austin v. The Manchester, Sheffield, and Lincolnshire Railway Company*, 16 Q. B. 600; *Shaw v. The York and Midland Railway Company*, 13 Q. B. 347. That being so, the 17 & 18 Vict. c. 31 passed, which renders the special contract void, unless it is just and reasonable. Whether or no a contract is reasonable must depend on the circumstances of each particular case. Here the plaintiffs were desirous of availing themselves of a speedy conveyance of their fish to market by the defendants' railway. The defendants did not profess to carry fish as common carriers, but consented to do so under a special contract. The plaintiffs agreed to those terms, and signed the contract, as they had been in the habit of doing for some years; then how can they now say that the contract is not reasonable? A railway company is no more bound to carry fish than they are to carry horses, and if they do so under a special contract, they are not responsible as common carriers. *Carr v. The Lancashire and * Yorkshire* [* 883] *Railway Company*, 7 Ex. 707. Fish being a perishable article, the company were justified in refusing to incur the risk of its conveyance, unless the plaintiffs paid a higher rate, or exempted them from the liability of ordinary carriers. They do not say that they will not be liable for any loss or injury, but only in case of their neglect to take the ordinary care which any person would of his own goods. The meaning of the contract is, that wherever injury has arisen from delay, the plaintiffs shall not rely simply upon the fact of the fish not having been carried in time, but must prove that the delay was caused by gross negligence or fraud. What is gross negligence appears by the judgment of this Court in *Wylde v. Pickford*, 8 M. & W. 443. [MARTIN, B. — The Act says that the conditions must be just and reasonable. Under this condition the plaintiffs could not recover unless they proved

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gross negligence or fraud, which would be very difficult. POLLOCK, C. B. — It seems to me that the seventh section does not apply to a special contract entered into between the parties. MARTIN, B. — If the decision of this case rested with me I should be prepared to say, on the authority of *M'Manus v. The Lancashire and Yorkshire Railway Company*, that the condition is not reasonable. There is the judgment of a Court of Error, and we ought to act upon it. This condition seems to me an evasion of that judgment. It would be difficult, if not impossible, for the plaintiffs to prove gross negligence or fraud. But as the other members of the Court entertain a different opinion, I do not object to the rule being absolute.]

POLLOCK, C. B. — It appears to me that the case of *M'Manus v. The Lancashire and Yorkshire Railway Company* does not decide the present case. I think that the 17 & 18 Vict. c. 31 was [* 884] not intended to apply to a * written contract signed by the party who sends the goods. If that were the only point in the case, I should feel bound to state that I differ from what has been said by my Brother Martin. But that is not so, and without intending to give a judgment opposed to that of the Court of Exchequer Chamber, I will state, incidentally, that in my opinion a contract to which a person has signed his name is, *quoad him*, a reasonable contract. He has agreed to it, and therefore has no right to complain of it. It seems to me that the words of the statute apply only to those general conditions which a railway company may impose on the public, and not to a special contract which an individual may enter into with them. No doubt there is greater difficulty in proving negligence against a railway company than against a common carrier on a public road: but we cannot judicially notice any difficulty of proof and say that it shall make a contract unreasonable which other circumstances have made reasonable. It would be unbecoming, in a judgment of the Court, to recognise the difference between a case in which a railway company is plaintiff or defendant, and an individual, who may not be so well able to bear the expenses of the suit. Therefore, the difficulty of proof cannot make the contract reasonable or unreasonable: impossibility of proof might alter the case. If a contract imposed a condition with which it was impossible to comply, I should say that the contract was unreasonable. But

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I think that this contract, with reference to the liability for damage, is not unreasonable. The company were not bound to carry fish; at all events they were not bound to carry it by a rapid train; and they had a right to say, the rapidity of this train is for the benefit of passengers, and if we find that we cannot carry by it both passengers and fish, we will leave the fish and carry the passengers, whose arrival is of more importance. Though there may be difficulty in proving * gross negligence, to [* 885] throw the burden on the company of disproving it would afford them no protection. For these reasons I think the rule ought to be absolute.

BRAMWELL, B. — I am also of opinion that the rule ought to be absolute. I consider that we are bound, by the decision of the Court of Exchequer Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company*, to put this construction on the statute,— that a special contract with a railway company, no matter how deliberately made, how much sought for by the party signing it, or how many years it may have been in existence, may be revised by the somewhat incompetent tribunal appointed for that purpose, and held not binding on the party who made it, upon the ground that there is something in it which, to the mind of the Judge who tries the cause, is not just or reasonable. When the question comes before me in a Court of Error, I shall consider whether the words of the statute are capable of the construction put upon them, and whether the statute contains an enactment which, in my opinion, is a direct invitation to fraud. The plaintiffs, in effect, say: "You have carried my goods on certain terms, but now it is convenient to me to say that I will not be bound by those terms, and you shall carry my goods on other terms." However, I consider myself bound by the case of *M'Manus v. The Lancashire and Yorkshire Railway Company*. I am also bound to suppose that it is not the Judge at the trial who is finally to determine the question on the materials before him, but that his judgment may be reviewed by the Court. Reasonableness is not a question of law, but a mixed question of law and fact, depending on the particular circumstances of each case. Suppose the company had said to the plaintiffs, it is not worth our while to carry fish, but if we do we will charge to the utmost extent, as if * insurers; and the plaintiff had replied, "I am content [* 886]

that you should not be insurers if you will make a less charge :” surely that would determine the question whether the contract was reasonable or not. Therefore, if the question comes before a Court of Error, and I am called upon to express an opinion respecting it, I shall consider how far the decision in *McManus v. The Lancashire and Yorkshire Railway Company* is correct. I should not have made these remarks except for the purpose of showing the extreme difficulty I have in applying the statute, as construed by the majority of the Court of Error, where we are called upon to determine whether the terms of a particular bargain with a railway company are just and reasonable. I do not know what test to apply. Reasonableness is a relative term. A contract may be reasonable with reference to certain circumstances, but not as to others. However, we must ascertain whether it was unjust or unreasonable for this company to stipulate with the plaintiffs that if they carried fish they would not be liable for loss of market, or other loss or injury from any cause whatever other than gross neglect or fraud. It seems to me that such a stipulation is most reasonable. The company might well say, “As to ordinary articles, if they arrive a little later we are content to be subject to an action, because we know that the owners will not sue us unless they have sustained substantial damage; but with respect to articles like fish, which require to be carried within a particular time, and the non-conveyance of which within that time might be attended with great loss, we would rather not carry them at all; but if we do, it must be upon the terms, either that a large sum is paid for the carriage, or that we shall not be liable for loss not occasioned by gross negligence or fraud. Such a condition seems to me most reasonable. There is another consideration which to my mind renders this contract reasonable. After the fish [* 887] is caught there may be * difficulty in landing it, and some time may elapse before it is brought to the railway station, so that when it arrives it may be more or less fresh. Probably there is no one at the station to see whether the fish is in a sound condition and capable of undergoing the journey, and consequently half-damaged fish may be sent to London. I do not mean to cast any imputation on the plaintiffs, but there is always this contingency, that a valuable cargo may be placed in the train at a distance from London, and when it arrives there it may be worth less than nothing. Then if, by some good fortune to the sender,

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the train has met with a trifling delay on the road, he is enabled to assert that it has spoiled his fish. It cannot be said that it is unreasonable for the defendants to guard against such a contingency. The plaintiffs need not employ the railway company. It is said that the company has a monopoly; but they do not prevent persons from sending fish by any other conveyance. The company are either bound to carry it, or they are not bound. If they are bound, let the plaintiffs tender their fish and a reasonable sum for its carriage; and if the company refuse to carry it they are liable to an action. If they are not bound to carry it, but are willing to do so upon certain terms, it seems to me monstrous that a party who has agreed to those terms shall afterwards be at liberty to say, "I am not bound by them," because in the opinion of a Judge, who perhaps may not be familiar with the subject, the terms are not just and reasonable. It seems to me upon every consideration that this contract is just and reasonable; and if there were no other reason, I think that the plaintiffs' conduct in entering into the contract furnishes abundant evidence of its being reasonable.

CHANNELL, B. — I am also of opinion that the rule ought *to be absolute. I consider that we are bound by the [*888] decision of the Court of Error in *McManus v. The Lancashire and Yorkshire Railway Company* to this extent, that the plaintiffs are not disentitled to contend that the condition is not reasonable, merely because it is contained in a contract which they have signed. I also think that it binds us upon another point, viz., that it is open to the Court to review the decision of the Judge at Nisi Prius upon the question of reasonableness. I also think that it binds us upon the point, that a condition which exempts the company from liability in every case is an unreasonable condition. Admitting that it binds the Court on the last point, the question is, whether the condition in the present case is distinguishable. I think it is, because it leaves the company open to liability in two events, gross negligence and fraud. Then, is the condition reasonable or unreasonable? I think it is reasonable. Fish is one of the several articles enumerated, all of them being articles of a perishable nature; and the company have not held themselves out to the world as common carriers of articles of that nature, but they are willing to carry them upon certain terms, of which they have given public notice, and which the plaintiffs have adopted by

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signing the contract. Assuming that some, if not all the grounds mentioned by the majority of the Court of Error apply to this case, I think that this contract is reasonable, and therefore binding on the plaintiffs who have signed it. As I understand, my Brother MARTIN intended to give the plaintiffs the benefit of amending the declaration in any way they could consistently with the contract; subject however to this, that if, in making the condition the basis of the contract, the defendants would have an answer to any declaration which incorporated it, the amendment was not to [* 889] be allowed. Treating this then *as a valid contract between the parties, there was a variance between the declaration as originally framed, charging the defendants as common carriers, and the contract proved. On the other hand no contract could be framed incorporating this condition, to which the defendant would not have this answer, viz., that the plaintiffs were unable to show a breach of the contract. Upon these grounds I am of opinion that the rule ought to be absolute.

MARTIN, B. — Had I been aware that the other members of the Court meant to deliver a deliberate judgment, I should have expressed my reasons for taking a different view more fully than I have done in the course of the argument. However, as the case is likely to go to a Court of Error, I shall content myself with saying that I think this condition is unreasonable, and that the case is in principle governed by the decision of the Exchequer Chamber in *M'Manus v. The Lancashire and Yorkshire Railway Company*.

Rule absolute.

This decision was brought up by appeal to the Exchequer Chamber; and, after argument, the Court took time for consideration.

[3 Hurl. & Colt. 340] The judgment of the Court was delivered by

CROMPTON, J. — This case was argued before the LORD CHIEF JUSTICE, my late Brother WIGHTMAN, my Brothers WILLES, BYLES, KEATING, and myself. We delayed delivering [* 341] *our judgment until after the decision of the House of Lords in the case of *Peak v. The North Staffordshire Railway Co.*, 10 H. L. Cas. 473.

In this case the question was, whether the condition imposed by the company and signed by the plaintiff, with reference to the car-

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riage of fish, was a reasonable condition within the provisions of the Railway Traffic Act.

The condition restricted the liability of the company to cases of gross neglect and fraud.

We think that this was not an unreasonable condition with reference to carrying a perishable commodity, especially where, as in the present case, the company were likely to be called upon to carry large quantities at unexpected times, and where a very slight delay might cause the loss of the market or the entire or partial destruction of the goods consigned.

In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill, and expedition, which may properly be expected from persons so holding themselves out and their servants.

It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the LORD CHIEF BARON in the Court below, where he says, "There is a certain degree of negligence to which everyone attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them."

The authorities are numerous, and the language of the judgments various, but for all practical purposes the rule may be stated to be, that the failure to exercise reasonable * care, [* 342] skill, and diligence is gross negligence. What is reasonable varies in the case of a gratuitous bailee and that of a bailee for hire. From the former is reasonably expected such care and diligence as persons ordinarily use in their own affairs, and such skill as he has. From the latter is reasonably expected care and diligence, such as are exercised in the ordinary and proper course of similar business, and such skill as he ought to have, namely, the skill usual and requisite in the business for which he receives payment.

The company therefore, properly speaking, exclude their liability as insurers, and not their liability for a want of reasonable care, skill, and expedition.

This is well illustrated by the case of actions against attorneys, where the law only attaches liability in the case of gross negligence, which a jury has always been supposed competent to deal with under the direction of a Judge; and it seems to us that the

degree of negligence which the law points out as that which is necessary to make a professional paid agent liable, is not an unreasonable criterion of the reasonableness of the limit to which the carrier seeks to restrict his liability.

We think that such a restriction leaves the individual sufficiently protected, as put by our Brother KEATING in the course of the argument; and we think that, in looking at this enactment, the real question is whether the individual and the public are sufficiently protected from being unjustly dealt with by the parties having the monopoly.

The provision in question, being a proviso on that part of the 7th section of the Railway Traffic Act which enacts that the companies shall, notwithstanding their notices, be liable for neglect or default, and qualifying that enactment in the case of reasonable and signed contracts, seems to us clearly to contemplate that the companies,

by contracts which are reasonable and duly signed under [* 343] the Act, may *protect themselves from some species of negligence; and we do not think that a condition which leaves them liable in all cases where carriers are liable for gross negligence is an unreasonable condition, in such a contract as in the present case, for the carriage of so perishable a commodity as fish, under the circumstances in which they are called upon to carry it.

We think, therefore, that the judgment of the Court below should be affirmed.

The LORD CHIEF JUSTICE does not agree in the conclusion to which the majority of the Court have arrived, thinking that the decision in the case of *Peak v. The North Staffordshire Railway Co.* leads to a contrary conclusion; and I believe that my late Brother WIGHTMAN took a different view of the case from that which we take.

Judgment affirmed.

ENGLISH NOTES.

The former of the above principal cases is followed and applied by the judgment of the majority of the Queen's Bench Division in Ireland in *Mahony v. Daworen* (1891), 30 L. R. Ir. 664. The action was against a solicitor for negligence in preparing particulars and conditions of sale of land for the plaintiff who had employed him for the purpose. The particulars described the land as free from incumbrance, whereas it was liable to certain instalments of purchase-money of tithe rent charge; and the purchaser had got an abatement from the price accord-

ingly; but stated at the trial that he would have bid the same price if he had been informed of the liability. The defendant had not inquired of the plaintiff before preparing the particulars whether the tithe rent charge or any instalments of it were payable out of the lands; and the plaintiff had in fact forgotten the circumstance. The Court by a majority held that there was no evidence of negligence, and that a verdict and judgment should be entered for the defendant.

Upon the use of the term "gross negligence" the observations of Mr. Justice WILLES in *Grill v. General Iron Screw Colliery Co.* (4 R. C. 680), L. R. 1 C. P. 612, may also be referred to. In effect, *negligence* is a negative word; and the negligence which is relevant in a particular case is the absence of the care which is due under the circumstances. The term "gross" gives no assistance by way of definition. In the judgment of the Judicial Committee in *Giblin v. McMullen* (1869), 3 R. C. 613 (L. R. 2 P. C. 317, 336), on the other hand, it is pointed out that although the term "gross" as applied to negligence wholly fails as a definition; the epithet is not necessarily without significance, and may be sensibly applied to indicate a comparison between situations where a less or a greater degree of care is exacted, and where, conversely, the description of negligence to infer liability is different.

Upon an analogous point as to liability under a special contract of carriage under the conditions of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), sect. 6. See *Manchester, Sheffield, and Lincolnshire Railway Co. v. Brown* (H. L. 1883), 8 App. Cas. 703, 32 W. R. 207; *Dickson v. Great Northern Railway Co.* (1886), 18 Q. B. D. 176, 56 L. J. Q. B. 111, 55 L. T. 868, 35 W. R. 202; *Great Western Railway Co. v. McCarthy* (H. L. 1887), 12 App. Cas. 218, 56 L. J. P. C. 33, 56 L. T. 582, 35 W. R. 429; *Smith v. Midland Railway Co.* (1888), 57 L. T. 813; *Sheridan v. Midland Great Western Railway (Ireland) Co.* (1888), 24 L. R. Ir. 146; *Nevin v. Great Southern & Western Railway Co.* (1891), 30 L. R. Ir. 125.

AMERICAN NOTES.

In the United States, the English distinction between counsel and attorneys does not prevail; and one who performs the duties of counsel is liable for negligence to the same extent as one who performs the duties of attorneys.

Gross negligence is not necessary to charge an attorney in America.

Varnum v. Martin, 15 Pickering (Mass.), 440 (1834), was an action by a former client against his attorney for negligence in making out a writ in the sum of twelve dollars instead of twelve hundred dollars, by reason of which the plaintiff lost a debt of \$1,000. It was held that this was a want of ordi-

Nos. 2, 3. — *Purves v. Landell*; *Beal v. South Devon Ry. Co.* — Notes.

mary care and diligence on the part of the defendant, which rendered him liable to the plaintiff for the damage suffered thereby. To the same effect are the later cases in the same State of *Holman v. King*, 7 Metcalf, 384, and *Caverly v. McQueen*, 123 Massachusetts, 574.

In *Wilson v. Russ*, 20 Maine, 421 (1841), Mr. Justice EMERY for the Court said (page 424): "The attorney is bound to execute business in his profession entrusted to his care, with a reasonable degree of care, skill, and despatch. If the client be injured by the gross fault, negligence, or ignorance of the attorney, the attorney is liable; but if he act with good faith, to the best of his skill, and with an ordinary degree of attention, he will not be responsible."

The mere fact that the client is nonsuited is not sufficient evidence of negligence to render the attorney liable. *Gleason v. Clark*, 9 Cowen (New York), 57.

Unreasonable delay on the part of an attorney in starting a suit, after he has been properly retained, constitutes negligence. *Rhines v. Evans*, 66 Pennsylvania State, 192; *Walpole v. Carlisle*, 32 Indiana, 415.

In *Livingston v. Cox*, 6 Barr (Penn.), 360, an attorney's neglect for six months to commence a suit against a debtor in failing circumstances was held unreasonable delay, for the consequences of which he was liable to his client.

The rule with respect to conveyancers is the same as that which applies to lawyers and physicians. They are liable only for the want of ordinary knowledge, skill, and caution, and not for errors of judgment, especially when the question of law involved is unsettled. *Watson v. Muirhead*, 57 Pennsylvania State, 161 (1868). See in further illustration of the rule: *Walker v. Sterens*, 79 Illinois, 193; *Dearborn v. Dearborn*, 15 Massachusetts, 316; *Goodman v. Walker*, 30 Alabama, 482; *Gambert v. Hart*, 44 California, 542.

No. 4. — Daniel v. Metropolitan Railway Co., L. R. 5 H. L. 45. — Rule.

No. 4. — DANIEL v. METROPOLITAN RAILWAY COMPANY.

(H. L. 1871.)

No. 5. — METROPOLITAN RAILWAY COMPANY v. JACKSON.

(H. L. 1877.)

No. 6. — THE DOUGLAS.

(C. A. 1882.)

RULE.

WHERE liability is sought to be established for breach of an implied duty to take care, it lies upon the plaintiff to prove some negligent act or omission, and to show that it is the proximate cause of the injury alleged.

Daniel v. Metropolitan Railway Company.

L. R. 5 H. L. 45-63 (s. c. 40 L. J. C. P. 121; 24 L. T. 815; 20 W. R. 37).

Railway. — Dangerous Works. — Passengers. — Precautions. [45]

Where works are going on over a line of railway, with which works the railway company has nothing to do, and the execution of such works is intrusted to contractors who are entirely independent of the railway company, it is not the duty of the railway directors to assume that such works will be negligently conducted by those who have contracted for their execution, and to take precautions against possible negligence on the part of persons who are not in their employment nor under their control.

Per the LORD CHANCELLOR (LORD HATHERLEY). — If railway directors undertake to carry passengers over their own line, and also over another line, they would be bound to see that their own was in perfect order, and would be responsible for any negligence occurring on the other line, over which they had contracted to carry passengers, whether under their control or not, but would not be responsible for matters altogether extraneous to the work in which they were engaged, unless there was reasonable ground for apprehending that extraordinary precautions were required.

Per Lord COLONSAY. — If the operation which the contractors were performing was one which, according to previous knowledge and experience, was, however carefully performed, likely to lead to mischief, it would be incumbent on the railway company to foresee and take precautions against it.

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The Corporation of the City of London was authorised by an Act of Parliament to execute certain works over the line of the Metropolitan Railway Company. These works consisted partly in placing heavy iron girders upon the walls running along the line of railway, and were therefore works in the execution of which danger was involved, but which were often executed elsewhere without mischief. The railway company had no control over these works, which were executed by contractors engaged by the corporation. Several girders had been safely put in their places by manual labour, but, on this occasion, the contractors brought into use for one of the girders a monkey steam-engine which moved the girder with a jerk, and so caused it to overbalance and fall. It fell on a passing train, and injured the plaintiff: —

Held, that this was not a mischief the occurrence of which the railway company was bound to anticipate, and against which it was bound to take precautions, and consequently that the railway company was not liable in damages.

Where a plaintiff has closed his evidence, and the Judge who tries the cause is of opinion that there is no case to go to the jury, he ought to direct accordingly.

giving leave, if necessary, for the plaintiff to move to enter a verdict in [*46] his favour. But it is erroneous under such circumstances to take a *formal verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him should the Judges (to whom power is reserved to draw inferences of fact) be of opinion that on the facts the verdict ought to be so entered.

This was an appeal under the Common Law Procedure Act, 1854, against a decision of the Court of Exchequer Chamber, which had reversed a judgment of the Court of Common Pleas.

The appellant, on the 19th of December, 1866, had been a passenger by the Metropolitan Railway train to be conveyed from the Moorgate Street Station to King's Cross, and while proceeding on his journey, at a place not above a hundred yards distant from the Aldersgate Street Station, was seriously injured by the fall of an iron girder. The declaration alleged that the defendants were carriers, and then charged them in the common form with negligence. There was a second count in a similar form. The declaration was afterwards amended by the addition of a third count, which set forth that the defendants were possessed of a certain line of railway for the conveyance of passengers for hire, upon or over which railway were being carried on, as the defendants well knew, certain works dangerous to the lives or limbs of persons travelling or being conveyed upon the said railway, and the defendants, while the said works so being dangerous as aforesaid, were in progress, and well knowing the premises as aforesaid, invited the plaintiff, who had no notice, and was ignorant of the said works, or of the carrying on of the same, to come upon the

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said railway: And thereupon, whilst the said works, so being dangerous as aforesaid, were being carried on as aforesaid, the plaintiff, in pursuance of the said invitation of the defendants, went upon the railway, and was received by the defendants, and was by them put into a carriage upon the said railway to be carried as a passenger, &c.: And while in the carriage he was injured by reason of the said works, &c.

The defendants pleaded: First, not guilty; secondly, that the plaintiff did not come as a passenger, as in the first and second counts alleged; thirdly, as to the last count, the defendants denied that over or upon the said railway were being carried on, as they, the defendants, well knew, certain works dangerous to the lives or limbs of persons travelling or being conveyed along * the said railway, as in that count alleged; fourthly, [* 47] that they did not invite the plaintiff as therein alleged.

Issue was taken on all these pleas.

The cause was tried before Mr. Baron MARTIN at the Croydon Assizes on the 16th of August, 1867. The evidence showed that at that part of the line works were being executed by the Thames Ironworks Company under a contract with the Corporation of London, the object of which was to make a floor for the London Meat Market. To effect this object iron girders of great weight and strength were placed between and on the walls which formed the sides of the railway. These works were being executed under an Act of Parliament which gave the Metropolitan Railway Company no control whatever over them or over the men employed in executing them. The weight of the girders and the difficulty of moving them made the work dangerous; but such work had been performed in different places for years without mischief occurring.¹ In some instances of the kind the railway company had placed a signalman to give notice of the approach and passing of trains. There was no such signalman on this railway, nor any arrangement made by which the work of placing the girders might be suspended on the passing of a train. It was believed that this particular girder had gone beyond its balancing line, and had so fallen over. It fell on the passing train, killed three passengers, and seriously injured the plaintiff.

¹ The summary of the evidence given at the trial is not set forth here, as the LORD CHANCELLOR in his judgment quoted it fully in order to comment upon the most material parts.

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At the close of the plaintiff's case, and on the suggestion of the learned Judge, a verdict was entered by consent for the plaintiff, subject to leave reserved to the defendants to set it aside and enter a verdict for the defendants, or a nonsuit, on the ground that there was not sufficient evidence of negligence on the part of the defendants to support the plaintiff's case. The Court was to be at liberty to draw inferences of fact, and to adjudge upon the evidence.

A rule was obtained upon this leave reserved, and the rule was discharged (L. R. 3 C. P. 216). The defendants appealed to the Court of Exchequer Chamber, where that decision was [*48] reversed, and a verdict * was ordered to be entered for the defendants (L. R. 3 C. P. 591). This appeal was then brought.

The Solicitor-General (Sir J. D. Coleridge), and Mr. William Vernon Harcourt, Q. C. (Mr. Morgan Howard was with them), for the appellant:—

There was no conflict upon the rules of law in the Courts below; but they differed on the application of the law to the facts. Yet it can hardly be doubted that negligence on the part of the defendants was clearly made out. The work was in itself dangerous. Every one knew that. That fact imposed on the defendants the duty of taking all reasonable precautions that such danger did not result in actual mischief. The law prescribed that duty, and all the more so as the passenger knew nothing of the danger, and could not by any care provide against it. Yet no such precautions were taken; there was no signalman to give notice of the approach of the trains, and to stop the work till a train had passed. Nor was anything else done to prevent a mischief from work which was well known to be dangerous. In other cases these precautions had been taken, and so mischief had been averted.

The rule of law was, that precautions should be taken in such a case. The doctrine stated by Lord Chief Justice EYRE in *Aston v. Heaven*, 2 Esp. 533 (5 R. R. 750), as to a stage-coach, that "a driver is answerable for the smallest negligence," has been expressly adopted into the American law "as applicable to all modes of carrying passengers." Redfield on Railways, 3rd ed. vol. ii. pp. 174, 175, and notes. On that principle, too, had proceeded the case of *Birkett v. Whitehaven Junction Railway Com-*

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pany, 28 L. J. Ex. 348, 4 H. & N. 730. There the defendants' line ended at Maryport Station, which belonged to another company; but for the use of it and for the use of a switch (which was self-acting) for entering the station, the defendants paid a rent. A servant of the defendants' company was employed to look after some neighbouring gates, and to see that the switch acted correctly. He had not done so on this occasion, and it did not act, and the defendants' train ran into the trucks of another company, and a passenger was killed. On an *action by [*49] his widow, and a verdict being given for the plaintiff, it was held that there was evidence of negligence to affect the railway company, and the verdict was sustained. That, too, was the principle on which this House proceeded in *The Mersey Docks v. Gibbs*, 11 H. L. C. 686, L. R. 1 H. L. 93. In *Dudley v. Smith*, 1 Camp. 167 (10 R. R. 661), Lord ELLENBOROUGH held that the driver of a stage-coach, before passing through any place that is dangerous, is bound to inform the passengers of the full extent of the danger, and if he does not, the proprietor is liable for any injury which they might have escaped by alighting. Now the principle there was, that the carrier was bound to take all reasonable precautions against danger; and on that principle it is clear that here the defendants ought to have had a man to signal the moment at which a train was about to pass, and so to stop the dangerous works until it had gone by. *Redhead v. The Midland Railway Company*, L. R. 4 Q. B. 379, 9 B. & S. 519, shows that though a railway company does not warrant the actual safety of the passengers, it is bound to use every precaution to insure that safety. That rule would make it necessary that where two companies exist and are acting independently of each other, should a mischief happen, the company carrying the passenger, though having no control over the other company, will be liable to him, because a danger existed and was known to exist, and yet every proper precaution was not taken against it. See *Burton v. The North Eastern Railway Company*, L. R. 3 Q. B. 549; and *Thomas v. The Rhymney Railway Company*, L. R. 5 Q. B. 226. All these circumstances were found in this case, and the railway company ought to be held liable.

Sir R. Palmer, Q. C., Mr. Hawkins, Q. C., Mr. C. E. Pollock, Q. C., and Mr. H. Lloyd, Q. C., were for the respondents; but the House intimated a desire to consider the matter before hearing them, and the case was therefore adjourned.

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The LORD CHANCELLOR (Lord HATHERLEY), having stated the facts of the case, said:—

The matter took a course in the Court below which is in some degree slightly embarrassing in point of form. But I think [* 50] that *we are sufficiently in possession of the whole facts of the case to be able to come to a clear and decisive conclusion on the subject. The work was undoubtedly not under the control or management of the defendants, but must be regarded as a work undertaken by an independent company. And even if it had been under the management of the defendants, the work was placed properly in the hands of a contractor, who was bound to execute it in a proper and reasonable manner. I do not think, therefore, that any substantial difficulty can be occasioned in the consideration of the case by the particular position of the Metropolitan Railway Company with reference to any interest in the contract. What we have to consider is this: How far the defendants are liable in respect of this mischief which occurred, not through the actual operation or proceeding of any servants of theirs, but through a mischance which occurred (whether by negligence or otherwise it is not particularly important, so far as the defendants are concerned, to say) in the execution by other persons of a work constructed over their railway. [His Lordship, having stated the proceedings up to the trial, said:—]

The case was tried originally, I think, at the Surrey Assizes, and there, after evidence had been entered into for the plaintiff and none had been given by the defendants, the Judge made an order in this form: "On the suggestion of the learned Judge a verdict was, by consent, entered for the plaintiff, subject to leave reserved to the defendants to set it aside, and instead thereof to enter a verdict for the defendants, or a nonsuit, on the ground that there was not sufficient evidence of negligence to support the plaintiff's case, the Court to be at liberty to draw inferences of fact and to adjudge upon the evidence." Accordingly a rule to show cause was moved for in the form provided for by the order which had been made by the Judge. And when the matter came before the Court of Common Pleas, on the original hearing, the rule was discharged. The matter was then taken by way of appeal to the Court of Exchequer Chamber, and upon the case coming before that Court, this order was made: "It is ordered that the decision of the Court of Common Pleas be reversed,

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and that the verdict found for the plaintiff on the trial of the said cause at the last Summer Assizes, holden in and for the * county of Surrey, be set aside, and instead thereof a [* 51] verdict be entered for the defendants.”

Now there is some little embarrassment in the form that “the Court is to be at liberty to draw inferences of fact and to adjudge upon the evidence.” The Judges in the Common Pleas appear to have thought that the evidence as given at the trial would justify them in coming to the conclusion, in point of law, that there had been that amount of negligence on the part of the defendants which entitled the plaintiff to a verdict. The learned Judges in the Court of Exchequer Chamber, whose judgment was delivered by Mr. Justice BLACKBURN, seem to have been of opinion that there was not, in fact, evidence to go to a jury, for at the end of the learned Judge’s deliverance of the judgment, occur these words: “Nevertheless we are obliged to find that the plaintiff ought to have been nonsuited, and the consequence is, that judgment will now be entered for the defendants.” In form, therefore, there is some degree of embarrassment, but in substance the point which we have to ascertain is this, whether or not such a case was made out upon the evidence as to justify the plaintiff, in law, to say that he is entitled to damages as against the defendants for the injury inflicted upon him, occasioned, as he contends, by their negligence. For that purpose the whole of the evidence has been printed, and thus we have before us the whole case.

The circumstances of the case are these: It is quite certain (I shall read the passage in the evidence which proves it) that there was nothing at all upon the line itself which occasioned the damage. Indeed, that is hardly contended for. It is sufficient to say that one of the first witnesses who is called, a witness of the name of John Simpkins, gives evidence to this effect: He is asked this question, “There was nothing at all of any sort or kind to indicate danger to you? No, not the least; nothing at all.” Then he is asked, “And you had no reason to expect any accident?” He answers “No.” In fact, there was nothing in the shape of an obstacle or obstruction on the line of railway. The whole mischief which was occasioned, was occasioned by the falling of that girder which, as I stated before, was not under the control of the defendants, but of persons employed in constructing the work.

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[* 52] * Now those persons were examined, and we have their evidence before us ; and I think it will be well first to see the exact state of the facts. It appears that several of those girders had been passed over the railway by hand, without the slightest mischief occurring, or the appearance of any probability of mischief ; but for the first time a new mode of propelling the girders across the railway was used in the case of this particular girder, which ultimately fell and occasioned the accident. The work of placing those girders is a work of great delicacy in a certain respect, because there is a mark put upon the girder, which is called the “balancing mark,” beyond which it ought not to be shoved or moved in any way. If it goes beyond this mark, it overbalances itself ; and if it overbalances itself, there is at least a possibility of mischief.

Perhaps the most important witness of the whole is Mr. Henry Smith, who gives evidence as to the damage, and as to the character of the work, and of whom the learned Judge says at the end (and I agree with the observation), that he appears to be a very intelligent man : his evidence, indeed, fully bears out that remark. Smith has been employed very frequently in this kind of work, and he describes it as I have described it ; namely, as a work which requires some degree of attention, and as to which there would be some degree of risk if attention were not paid : he says that up to that time the steam-engine had not been tried for this purpose, but that for the first time they now employed engine power : so that the girder was less completely under their power than it had been when it was moved by hand labour. The passage upon which the learned counsel principally relied is a passage in which Smith gives the following evidence : “I believe you have had great experience in this sort of work ? I believe I have had very nearly twenty years.” “Is it a dangerous thing ? It is very dangerous ; we are always liable to accidents.” “In moving these girders ? In the moving of these girders.” “Mr. Baron MARTIN : But in whose service were you ? I was employed by Mr. Malding.” Mr. Malding is a person who was afterwards called. Then the witness proceeds to say that this was the first attempt that they had made with a steam-engine, and that the movement was by jerks ; and of course a movement by jerks is not subject to the same control as a movement by hand

[* 53] would be. * Now it is very important to look at the

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end of his evidence, because, having stated that he has been engaged for twenty years in this sort of work, and that it was always liable to accidents, he nevertheless gives this evidence. He is asked by Mr. Baron MARTIN: "Has it frequently happened, or has it occasionally happened, that a girder has fallen while you were employed in this way?" to which he answers, "I never had a girder fall where I was before in my life; I have been in the work for years; I have had some slight accident, such as a man's arm broken, or something of that kind, but never lost any lives — never any one killed — we are all liable to that in our employment." Now I think we have the exact measure of the degree of danger to be ascribed to this operation. The moving of a heavy thing is at all times dangerous — the carrying of a heavy hod of mortar may be in a certain sense dangerous — if the man should slip, or if there should be any carelessness while he is proceeding up the ladder; and this work is to a certain extent dangerous: but though this man has been employed for twenty years in it, he never had an accident before. Showing, therefore, that if due care is used there is no particular liability to an accident, and that this particular accident is to be reasonably accounted for by the fact that they now for the first time employed engine power in moving the girder, which engine power, pushing by jerks, and not by the regular movement, which is obtained where human labour is employed, appears to have occasioned this mischief.

The remaining witness, John Malding, was the person who employed the last witness, of whom Mr. Baron MARTIN said that he was a very sensible witness. Malding is asked the question: Whether railway people do not usually, in similar works, employ somebody to look out? At page 37, letter B (printed papers in the case), he is asked: "Now, upon similar works over a railway, what has been the course adopted?" And he answers: "There has generally been one of the railway company's servants there with a flag, and also to call out to the men that there is a train coming, for them to cease working; or, if there should be anything to obstruct the line, to stop the trains from coming." On his cross-examination it appears that he is speaking of works in which, for the most part, the *persons carrying on the [*54] works of the railway were the same contractors who were carrying on the other works, and who, therefore, would be careful to attend both to the one and the other. In that state of things

the question is this: Whether in the case of a railway company which is not itself carrying on the work, but the engines and trains of which have to pass a place where the work is going on, and where, undoubtedly, an accident is possible, and of course more probable than when no work is going on at all, it is, under such circumstances as exist here, the duty of the railway company to employ persons to watch and see that no accident occurs owing to the negligence of other people — of people over whom the railway directors have no control? When we speak of the danger of such an accident, it must always be attributed to a want of care on the part of the persons performing the work in question, because the superintendent of these and similar works tells us that in twenty years he had never known an accident of this kind to occur. As to the execution of the work, therefore, the evidence gives every reason to suppose that it was in the hands of skilful and proper workmen, who would take all necessary care, which they are bound to do, to see that no accident occurred. Under such circumstances the question is, I repeat, whether these defendants were bound to employ persons specially to watch and see that no accident occurred from the negligence of men whom they did not employ and over whom they had no control?

There has been a case put by one of the learned Judges in the Court of Common Pleas — Mr. Justice WILLES — which very aptly illustrates what would be the reasonable duty of a company, like a railway company, carrying passengers for hire. He gives the case of a waggon heavily laden with goods, piled up to that enormous height to which we often see waggons piled up in this metropolis — that waggon passing along the road, and the goods being so improperly packed that a bale of goods falls upon a stage-coach and kills or injures a passenger. In that case the learned Judge was of opinion that the stage-coach proprietor would not be responsible; and I apprehend that the groundwork of that opinion is, that those who undertake the carriage of passengers are bound to take all reasonable precaution and care with reference to any danger which [* 55] may reasonably be expected upon the line of road * over which they travel. An instance of that kind is given in an authority which has been cited before us — namely, an accident accruing from switches on a line of railway not being found in their proper place, and those switches not being on the line of railway which is the property of the company which is

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conveying the passengers, but forming part of a line over which the company has contracted to convey the passengers. They would be obliged to see that their own line of road was in perfect order, and they would be responsible for any negligence which occurred on the other line of road, whether under their control or not, if they have contracted to carry passengers over that particular piece of road; but they would not be answerable, as I apprehend, for any mischief occasioned by any matter extraneous altogether to the work in which they were engaged, and as to which they had no reasonable ground for supposing that ordinary and proper care had not been taken by those persons whose duty it was to take such care. Going back to the case of the waggon, I cannot understand why, if Mr. Justice WILLES was of that opinion, he should not have considered the stage-coach proprietor in that instance equally liable for the goods falling off the waggon upon his passengers with the railway company in this instance; because, if we ask the question, whether there is not more danger in passing a waggon so laden than in passing over an ordinary public road under ordinary circumstances, that question must be answered in the affirmative. Anybody driving along a road, and seeing a waggon thus heavily laden (the possibility of which being insufficiently packed must, of course, occur to any mind, its very appearance being alarming to those who pass, who must know that there is a risk—a possibility of accident), would be bound, according to the doctrine which has been held in this case, to drive on the other side of the road, or to wait till the waggon has gone in some other direction, and he would be guilty of negligence in passing by that waggon, the risk attending the passing of which must be a greater risk than the risk of passing along an ordinary line of road. I apprehend that all that is to be done by those who carry passengers for hire is that they are bound to see that everything under their own control is in full and complete and proper order. They are bound to see, also, if there be a certain and definite risk as to which they have any knowledge, * or can reason- [* 56] ably be supposed to have any knowledge, that it is sufficiently guarded against. For instance, a trench may be dug across a road through no fault of theirs, and in such a case they could not be held to be liable; but if there is any reasonable ground for apprehending that extraordinary precaution is wanted, they would be liable. But in a case in which a work is being carried on by

competent and intelligent persons accustomed to the business, and in respect to which the evidence is simply this, — that although the work may be considered dangerous, the workmen employed in it have never known an accident before this time, and where the particular accident which has occurred was occasioned by a change from the cautious mode of doing the work hitherto pursued to a more incautious mode of doing it (I do not wish to prejudge a case which may be pending in other Courts against another company). — to hold the railway company liable for an accident of that description would, I think, be extending the liability of the company for damages, in consequence of supposed negligence in not taking precautions against every remote and contingent possibility of accident, to an extent beyond anything that has been laid down in any case with which I am acquainted, and which, indeed, common sense would not warrant.

For these reasons, my Lords, I venture to move that the judgment of the Court of Exchequer Chamber be affirmed, and the appeal dismissed with costs.

Lord CHELMSFORD:—

The unusual course taken at the trial has perplexed and embarrassed a case which would otherwise have been free from difficulty. Well might Mr. Justice BLACKBURN, in his judgment in the Court of Exchequer Chamber, describe the course taken as an inconvenient one, which must not be drawn into a precedent. The plaintiff had produced all the evidence upon which he relied to establish the liability of the defendants for the injury which he had sustained, and had closed his case. That case involved two questions, one as to the duty of the defendants, which was for the Judge to decide; the other, if the duty existed, whether there had been a breach of it proved, which was matter of fact for the jury.

The counsel for the defendants ought to have submitted [*57] to the Judge * that there was no evidence to go to the jury of the breach of any duty which the defendants were by law obliged to perform. If the Judge had been of that opinion he should have directed a nonsuit (of course, with the submission of the plaintiff), reserving to the plaintiff the liberty of moving the Court to enter a verdict for him. If the Judge had held that there was a sufficient case for the jury, the counsel for the defendants might have tendered a bill of exceptions to the Judge's ruling, or,

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if the jury had found a verdict for the plaintiff, might have moved the Court for a new trial for misdirection. Instead of one of these ordinary courses being adopted, the trial was terminated by an arrangement which has been treated in both the Courts below as reducing the question to one merely of fact, in the decision of which the Court was substituted for the jury. Yet the terms of the arrangement are, that the verdict is to be entered for the plaintiff, but that the defendants are to have leave to enter a verdict for them on the ground that there was not sufficient evidence of negligence to support the plaintiff's case. In other words, that the plaintiff's case failed for want of evidence; which is a question for a Judge and not for a jury. The Judges of the Court of Common Pleas having, however, undertaken the office of a jury, with which the parties had thus agreed to invest them, were of opinion that the evidence showed that there had been a want of that proper precaution which the defendants were bound to have adopted; and that the verdict entered for the plaintiff by consent must therefore stand.

The Judges in the Exchequer Chamber agreed with those of the Common Pleas, that there was evidence to go to the jury that the works being carried on over the railway were such as to require special precautions, and added that if a verdict had been found by the jury against the defendants, and they had been asked to say that it was against the weight of evidence, they could not have done so. And yet they refused to deal with the verdict of the Court of Common Pleas as if it had been the verdict of a jury, although the Court had been put by the parties in the place of a jury, with the same power over the facts. The Judges in the Exchequer Chamber, solely on the ground (as they expressed it) that the railway directors ought not, as reasonable people, to have expected that the girder would be falling down, and consequently * were not bound to take special precautions against [*58] such an event, felt themselves obliged, on what they called "the very inconvenient reservation," to find a verdict according to their own view of the facts, quite agreeing (as they said) with their brethren in the Common Pleas on the law, and agreeing, too, that there was evidence to support the verdict.

Now this being the view of the law and the facts taken by the Court of Exchequer Chamber, one feels rather surprised that the Judges should have arrived at the conclusion that judgment ought

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to be entered for the defendants. If the law laid down by the Court of Common Pleas is correct, that the work going on over the railway being a work of extraordinary danger, it was the duty of the company to take precautions; and if there was evidence to support the verdict, I do not see how a Court holding these opinions could properly disturb that verdict.

But was the law correctly stated by the Court of Common Pleas, that where a dangerous work is being carried on over a railway, not for the railway company, but for other persons, and for the proper execution of which work the company is in no way responsible, an obligation is imposed upon the company to provide against a possible danger which may arise from the negligent performance of such work. I apprehend, as a general proposition of law, that no such obligation exists.

There may be circumstances of imminent danger within the knowledge of the directors of a company which may render them liable if they run into it, and thereby occasion resulting injury to a passenger; but that they are bound beforehand to provide against possible future danger arising, not from the nature of the work itself (for risk accompanies all works of any magnitude), but from the negligence of the persons employed in carrying it on, is what I cannot conceive to be the law.

And yet Mr. Justice WILLES is of opinion that whenever there is a work of extraordinary liability to danger going on over a railway, that in itself, although the directors of the railway have no control over the work, is sufficient to oblige them to take precautions against it. The precaution which he considered necessary was the employment of a signalman; but whether for the purpose of stopping the work, or stopping the trains, he did not explain.

[* 59] And he * founded his opinion as to the necessity of this particular precaution being adopted, upon evidence of what had been done on previous occasions on other railways when work was going on upon them. Even if it had been shown that the defendants themselves had previously employed a signalman when work unconnected with their line was being carried on over it, that would not, in itself, be enough to cast the obligation upon them to take the same precaution in every other similar instance; and what had been done by other railways upon such occasions (if evidence at all) is evidence of the slightest description.

There is, in fact, no evidence to prove that any peculiar obliga-

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tion was imposed upon the defendants in this case differing from that which under similar circumstances would attach upon any other carriers of passengers. They had no reason, from anything which had previously occurred, to anticipate that there would be any negligence in the performance of the work. Girders had been safely conveyed to their proper places by manual labour; but this mode of working was changed in moving the girder which occasioned the injury to the plaintiff, for a donkey-engine, which, acting not by a continuous smooth movement, but by jerks, carried the girder beyond its balance, and so caused the mischief. It does not appear that the defendants were aware of this change in the power employed on the work, and, to use Mr. Justice BLACKBURN'S words, "though as reasonable persons they must have known that girders, if negligently handled, are likely to fall, they could have no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such an event," and so an obligation be imposed on them to take special precautions against an apprehended danger.

I am of opinion that the judgment of the Court of Exchequer Chamber ought to be affirmed.

Lord WESTBURY: —

My Lords, I am very happy to hear the opinions of my two noble and learned friends, because I think the decision of the Court of Exchequer Chamber, and your Lordships' affirmance of it, will go far to bring the law to its true foundation with regard to the liability of railway companies.

* I will notice in the first place the substantial part of [* 60] the argument, on the liability of companies, in the Court below. It was there chiefly contended that whereas, in ordinary cases, railway companies are held liable for the wrongful acts or wilful neglect of their servants, or the workmen in their employ, in the present case it was here sought to make these defendants liable for the acts or the negligence of persons who were not in their employ or subject to their control. I mark that, for the purpose of stating that, in my view of the case, it is quite immaterial whether the Thames Ironworks Company, which contracted for the execution of these works, was or not in the employ of the railway company. But the material position is this, that the contractors were, beyond all dispute, competent, responsible, and

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experienced persons in the construction of works of this description; and there can be no doubt that the works in question are by no means uncommon, for there is not an iron railway bridge throughout the land that has not been constructed by means of girders. We have, therefore, a contract providing for certain works to be constructed over the Metropolitan Railway, in no respect interfering with the line of road, by contractors who are fit and trustworthy persons for the performance of the work.

Now the difference between the Court of Common Pleas and the Court of Exchequer Chamber is this: The Court of Common Pleas puts out of view that contract, and the obligation resulting from it on the part of the contractors, and also the matter of the railway company being entitled to rely upon the adequate performance of that contract. Taking, therefore, a one-sided view of the liability of the railway company, as though there had been no interposed liability between the railway company and the contractors, the Court of Common Pleas arrived at the conclusion that the railway company was under an obligation to take unusual precautions during the construction of these works. What effect the contract had upon the obligation of the railway company was not in any respect considered by the Court of Common Pleas. But it was a material element in the matter, because the law unquestionably is, that the railway company had a right to depend upon the experience and skill, and sufficiency and care of the contractors.

And when Mr. Justice BLACKBURN in the Exchequer Chamber [*61] directed attention to that view of the case, the conclusion (which in the report is better given than it is in the printed papers) was expressed by him in a very short and felicitous manner. He said, "We unanimously come to the conclusion that the persons whose duty it was to take precautions were the persons by whom the work was being carried on; and that though the defendants, as reasonable persons, must have known that girders, if negligently handled, are likely to fall, they could have no reason to suppose that the persons who were doing the work would do it so negligently as to hazard the happening of such a result."

Now there has been on the part of the learned Judges of the Court of Common Pleas a complete *petitio principii*. They set out in their propositions with assuming this, that the railway company was under an obligation. The truth is, that the contractors

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were under the obligation — and the question is, whether in law the railway company had a right to rely on the contractors fulfilling that obligation.

As I took the opportunity of stating, in the course of the argument, to the counsel for the appellants, the ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and intrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose with prudence and care, as being experienced in the matter, and are held responsible for the execution of the work. My Lords, undoubtedly it would create confusion in all things if you were to say that the man who employs others for the execution of such a work, or the man who is a party to the employment, has no right whatever to believe that the thing will be done carefully and well, having selected, with all prudence, proper persons to perform the work, but that he is still under an obligation to do that which, to him, in many cases, would be impossible, — namely, to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons.

My Lords, these contracts were made under the provisions of an Act of Parliament. The works were to be carried over the line of the railway. There was nothing in them, as I have already * observed, uncommon or unusual: the girders were [* 62] made to span the whole of the railway, passing from one side of the abutment to the other, and embracing both. This was a kind of work which every person concerned as a contractor has almost daily been in the habit of doing. And what my noble and learned friend read from the evidence confirms that: for one man tells you he has been doing such work continually for twenty years, and has never known an accident occur. If it were necessary to go into it (which I think it is not), it is plain to any understanding that the accident in this case arose from circumstances of which the railway company could not have been aware — circumstances which it belonged entirely to the province of the contractors to observe and regulate — that it arose from the unusual circumstance that a peculiar motive power, namely, that of a small steam-engine, had been substituted by the contractors, for the first time, in moving the girders, which did not move them with a suffi-

ciently regular and gradual motion; so that, being moved by jerks, a jerk was applied to the girder at a time when the train happened to be passing by. It was, therefore, an undefined and unknown contingency which, even if you put the contract out of the question, it could not have entered into the minds of the railway company to foresee as possible, and therefore to guard against. But, as I have said, it is immaterial to enter into that view of the matter, for the broad ground of difference between the two Courts is that which I have stated.

The first Court overlooked entirely the responsibility of the contractors, and the right of the railway company to rely on that responsibility. The other Court takes that fact overlooked by the first into account; and, founding itself upon that fact, says that the responsibility of the railway company to take any extraordinary precautions never arose, for that the defendant had a right to rely upon the due performance of the work by the contractors.

My Lords, I have much satisfaction in thinking that this decision will greatly tend ultimately to bring the liability of railway companies to a position in which it may be found to be more consistent with law, and less with feeling and excitement, than it has hitherto been. I therefore concur with great pleasure in the motion that the judgment of the Court of Exchequer Chamber [* 63] be affirmed, and that this appeal be dismissed, and be dismissed with costs.

Lord COLONSAV. — My Lords, I entirely concur in the law as now laid down, I think properly in this case. At the same time, there is another element which I think should be attended to, and it is this: that if the operation which the Thames Ironworks Company was performing was one which, according to previous knowledge and experience, however carefully performed, was likely to lead to mischief, I think it would then have been incumbent on the railway company to foresee it and to take precautions against it. But I do not see in the evidence, which we are entitled to look into, anything which raises that state of facts in this case. I think it was an operation which, according to all experience, has been performed times out of number without any injury resulting from it, without any fall of a girder at all; and, therefore, the fall of the girder was not a thing which the railway was bound to contemplate as a probable or hardly possible occurrence, if due precau-

No. 5. — Metropolitan Railway Company v. Jackson, 3 App. Cas. 193, 194.

tions were taken. That being so, I think there was no negligence on the part of the defendants in not having stopped the train or stopped the operations of the people who were performing the work. The mischief seems to have occurred from a new mode of placing the girder, quite unanticipated by the railway company, and apparently not attempted before by any one, but which, unfortunately, resulted in this occurrence. Under these circumstances, I think that the contractors were the primary parties liable, and that there was no such negligence on the part of the defendants in the duty which they owed to their passengers, as to subject them to liability for damages.

Judgment of the Court of Exchequer Chamber affirmed, and appeal dismissed with costs.

Lords' Journals, 9th March, 1871.

Metropolitan Railway Company v. Jackson.

3 App. Cas. 193-212 (s. c. 47 L. J. Q. B. 303; 37 L. T. 679; 26 W. R. 175).

Railway Co. — Negligence, Evidence of.

[193]

Whether there is reasonable evidence to be left to the jury of negligence occasioning the injury complained of, is a question for the Judge. It is for the jury to say whether, and how far, the evidence is to be believed.

J. was a passenger by a railway; the carriage in which he rode was full. At station G. three persons forced themselves in, and were obliged to stand. There was no evidence that a complaint on this matter had been made to the railway officials, or that they knew of the fact. At station P. some other persons opened the door of the carriage, shut it again, and went away. There was, afterwards, a rush on the platform, and other persons opened the door of the carriage. J. stood up to prevent their entering, the train moved; J., to save himself from falling, put his hand upon the edge of the door of the carriage; at that moment a railway porter came up, pushed away the persons trying to get in, and slammed the door to, in doing which J.'s thumb was caught and crushed: —

Held, that this evidence did not establish such negligence on the part of the company as could be said to have occasioned the mischief, and the Judge ought so to have directed the jury.

This was an appeal against a decision of the Court of Appeal, affirming a decision of the Court of Common Pleas.

* The facts, which are fully detailed in the judgments, [* 194] were, in substance, these: Mr. Jackson was, on the 18th

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of July, 1872, a passenger by the Metropolitan Railway, going from the city westwards. At King's Cross Station the carriage in which he rode was full. At Gower Street Station (there being a great demand for seats) three persons forced themselves in, but, there being no seats vacant, were obliged to stand. At the Portland Road Station there was a rush of fresh passengers. The door of the carriage in which Jackson sat was opened by some persons, who looked into the carriage, saw it full, and shut the door. Then others came, opened the door again, and some persons tried to get into the carriage. Mr. Jackson rose from his seat to prevent them. While standing with his hands and arms extended, the train moved forward, a railway porter turned away the persons who had tried to get in, and, as the train moved forward and was entering the tunnel, hastily shut the door. Mr. Jackson, feeling the train begin to move, had put his hand on the lintel of the door to save himself from falling, and it was just at that moment that the porter slammed the door, and Mr. Jackson's thumb was caught by the door, and crushed. That was the cause of action.

The directors by their pleas denied their liability. At the trial before Mr. Justice BRETT, in December, 1873, there was no evidence given to show that at Gower Street or at the Portland Road Station any complaint had been made to the officials of the three extra persons in the carriage, though there was evidence that Mr. Jackson had remonstrated with the persons themselves. A witness named Underwood stated that he did not see a guard or porter at the Gower Street Station. The learned Judge ruled that there was evidence of negligence to be submitted to the jury, and the jury found a verdict for the plaintiff, with £50 damages.

A rule was obtained to set aside the verdict and enter a nonsuit or a verdict for the defendants, on the ground that there was no evidence of negligence proper to be left to the jury. On the 13th of November, 1874, this rule was discharged. The case was taken to the Court of Appeal, where Lord Chief Justice COCKBURN and Lord Justice of Appeal AMPHLETT were for affirming the judgment, and Lord Chief Baron KELLY and Lord Justice of Appeal BRAMWELL were for reversing it.

[* 195] * As the Court was thus equally divided, the judgment of the Court below stood as affirmed.

Mr. McIntyre, Q. C., and Mr. Kemp, Q. C., for the appellants: —
The question whether the facts proved in evidence constitute

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what the law recognises as negligence, is a question of law for the Judge, and must not be submitted to the jurors for them to draw the inference of negligence. Here there was no evidence of actual negligence, and the Judge ought to have directed the jury that no act of negligence, which could be treated as occasioning the injury complained of, had been proved. *Bridges v. The North London Railway Company*, L. R. 7 H. L. 213, had been misunderstood. There the acts done by the company's servants were directly connected with the happening of the mischief: here they were not. It was the plaintiff's own act that occasioned the injury; and that brought the case within *Siner v. The Great Western Railway Company*, L. R. 3 Ex. 150, 4 Ex. 117. *Robson v. The North Eastern Railway Company*, 2 Q. B. D. 85, and *Rose v. The North Eastern Railway Company*, 2 Ex. D. 248, were also cited.

Mr. Mellor, Q. C., Mr. Macrae Moir (Mr. Lewis E. Glen, with them), for the respondent:—

The appellants' own evidence showed that the appellants had been guilty of negligence; they were not prepared with a proper staff of officers to meet the demand of a crowd of persons coming to obtain places. Of course the result was an unchecked rush to the carriages, and then mischiefs were sure to follow. That had been the cause of the mischief here, and that established the right of the plaintiff to a verdict. The whole case had been properly laid before the jurors, and they had come to the clear conclusion that there was negligence here, and they had therefore awarded substantial damages. In all these cases the question was whether the facts proved did not establish negligence. The jurymen thought that they did, and that was a matter, negligence or no negligence, which could not be withdrawn from the cognisance of the jury. That was the course followed in *Bridges v. The North * London Railway Company*, L. R. 7 H. L. 213, and [*196] it had been properly followed here. *Cockle v. The London and North Eastern Railway Company*, L. R. 7 C. P. 321, showed that negligence of the sort shown in this case would make the company liable.

Mr. McIntyre replied.

The LORD CHANCELLOR (Lord CAIRNS):—

My Lords, in this case an action was brought by the respondent against the Metropolitan Railway Company for negligence in not

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carrying the respondent safely as a passenger on the railway, and for injuring his thumb by the act of one of the appellants' servants in suddenly and violently closing the door of the railway carriage.

The question is, Was there at the trial any evidence of this negligence which ought to have been left to the jury? The Court of Common Pleas, consisting of Lord COLERIDGE, Mr. Justice BRETT, and Mr. Justice GROVE, were of opinion that there was such evidence. The Court of Appeal was equally divided; the LORD CHIEF JUSTICE and Lord Justice of Appeal AMPHLETT holding that there was evidence, the LORD CHIEF BARON and Lord Justice of Appeal BRAMWELL holding that there was not.

The facts of the case are very short. The respondent in the evening of the 18th of July, 1872, took a third-class ticket from Moorgate Street to Westbourne Park, and got into a third-class compartment; the compartment was gradually filled up, and when it left King's Cross all the seats were occupied. At Gower Street Station three persons got in and were obliged to stand up. There was no evidence to show that the attention of the company's servants was drawn to the fact of an extra number being in the compartment; but there was evidence that the respondent remonstrated at their getting in with the persons so getting in, and a witness who travelled in the same compartment stated that he did not see a guard or porter at Gower Street.

At Portland Road, the next station, the three extra passengers still remained standing up in the compartment. The door of the compartment was opened and then shut; but there was [* 197] no * evidence to show by whom either act was done. Just as the train was starting from Portland Road there was a rush, and the door of the compartment was opened a second time by persons trying to get in. The respondent, who had up to this time kept his seat, partly rose and held up his hand to prevent any more passengers coming in. After the train had moved, a porter pushed away the people who were trying to get in, and slammed the door to, just as the train was entering the tunnel. At that very moment the respondent, by the motion of the train, fell forward and put his hand upon one of the hinges of the carriage door to save himself, and at that moment, by the door being slammed to, the respondent's thumb was caught and injured.

The case as to negligence having been left to the jury, the jury

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found a verdict for the respondent with £50 damages. There was not, at your Lordships' bar, any serious controversy as to the principles applicable to a case of this description. The Judge has a certain duty to discharge, and the jurors have another and a different duty. The Judge has to say whether any facts have been established by evidence from which negligence *may be* reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence *ought to be* inferred. It is, in my opinion, of the greatest importance in the administration of justice that these separate functions should be maintained, and should be maintained distinct. It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever. To take the instance of actions against railway companies: a company might be unpopular, unpunctual, and irregular in its service; badly equipped as to its staff; unaccommodating to the public; notorious, perhaps, for accidents occurring on the line; and when an action was brought for the consequences of an accident, jurors, if left to themselves, might, upon evidence of general carelessness, find a verdict against the company in a case where * the company was really blameless. It may be said that [*198] this would be set right by an application to the Court in banc, on the ground that the verdict was against evidence; but it is to be observed that such an application, even if successful, would only result in a new trial; and on a second trial, and even on subsequent trials, the same thing might happen again.

In the present case I am bound to say that I do not find any evidence from which, in my opinion, negligence could reasonably be inferred. The negligence must in some way connect itself, or be connected by evidence, with the accident. It must be, if I might invent an expression founded upon a phrase in the civil law, *incuria dans locum injuria*. In the present case there was no doubt negligence in the company's servants, in allowing more passengers than the proper number to get in at the Gower Street Station; and it may also have been negligence if they saw these

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supernumerary passengers, or if they ought to have seen them, at Portland Road, not to have then removed them; but there is nothing, in my opinion, in this negligence which connects itself with the accident that took place. If, when the train was leaving Portland Road, the overcrowding had any effect on the movements of the respondent; if it had any effect on the particular portion of the carriage where he was sitting, if it made him less a master of his actions when he stood up or when he fell forward, this ought to have been made matter of evidence; but no evidence of the kind was given.

As regards what took place at Portland Road, I am equally unable to see any evidence of negligence connected with the accident, or indeed of any negligence whatever. The officials cannot, in my opinion, be held bound to prevent intending passengers on the platform opening a carriage door with a view of looking or getting into the carriage. They are bound to have a staff which would be able to prevent such persons getting in where the carriage was already full, and this staff they had, for the case finds that the porter pushed away the persons who were attempting to get in. So also with regard to shutting the door: these persons had opened the door, and thereupon it was not only proper but necessary that the door should be shut by the porter; and

as the train was on the point of passing into a tunnel.
[*199] * he could not shut it otherwise than quickly or in this sense violently.

I have looked with some anxiety in order to discover what was considered by the learned Judges in the Courts below to be the evidence from which negligence might be inferred in this case. Lord COLERIDGE mentions two points of negligence: first, that there was no attempt made to remove the extra and inconvenient number of passengers from the carriage in which the respondent was seated when the company had an opportunity of doing so at the station; and, secondly, that there was an uncontrolled action on the part of a number of persons on the platform, which action was not controlled and could not be controlled by reason of the want of sufficient servants of the company, who were to a reasonable extent bound to control it.

As to the first of these grounds, I have already said that admitting the negligence, it appears to me to be in no way connected with the accident. As to the second, I do not think that there

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was an uncontrolled action on the part of the persons on the platform, for the case finds that the porter of the company did, in a way which seems to be both natural and proper, control the action of those who wished to get into the carriage.

Mr. Justice BRETT in substance concurs with Lord COLERIDGE, and I do not know that there is any substantial difference in the view taken by Mr. Justice GROVE.

In the Court of Appeal, however, Lord Justice AMPHLETT founded himself at the outset on the case of *Bridges v. The North London Railway Company*, L. R. 7 H. L. 213, in this House. He states (2 C. P. D. at p. 127), "It is now settled by that case, (though previously doubted by many eminent Judges,) that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding Judge." And in like manner the LORD CHIEF JUSTICE states at the conclusion of his judgment (2 C. P. D. at p. 145): "All that remains is to consider whether it was reasonably competent to the jury, if they thought that negligence was proved, to connect the accident to the plaintiff with that negligence as its cause, or as materially * contributing thereto. I cannot doubt, [*200] especially after the decision of the House of Lords in *Bridges v. The North London Railway Company*, that this was a matter of which the jury were the proper judges, and which it was incumbent on the presiding Judge to leave to their decision."

These expressions of the learned Judges appear to me to be of great importance, for I infer from them that if they had not considered the case of *Bridges v. North London Railway Company*, to have the effect which they attribute to it, their decision in the present case might have been different. Now, my Lords, I am bound to say that I cannot look at the case of *Bridges* as in any degree establishing the proposition which it appeared to Lord Justice AMPHLETT to establish, namely, that whether in cases of this sort negligence can be inferred from any given state of facts is itself a question of fact for the jury, or as establishing the proposition which it appeared to the LORD CHIEF JUSTICE to establish, namely, that the jurors are the proper judges whether, if once any negligence is proved, the accident which has occurred is to be connected with such negligence as its cause, or as

materially contributing thereto. Your Lordships, in the case of *Bridges*, did not lay down, and I am satisfied your Lordships did not mean to lay down, any new rule upon this subject. It is indeed impossible to lay down any rule except that which at the outset I referred to, namely, that from any given state of facts the Judge must say whether negligence can legitimately be inferred, and the jury whether it ought to be inferred. In the case of *Bridges*, there was a series of facts from which your Lordships, advised as you were by several of the learned Judges, thought that negligence might very reasonably have been inferred. There was the stopping of the train on a dark night in a tunnel badly lighted, and filled with steam; a heap of hard rubbish and no platform opposite to the carriage; the name of the station called out from the platform, and, after a short interval, when the train moved on, but not before some passengers had got out, a second cry, "Keep your seats!" One of those passengers was heard to groan, and was found lying with his legs across the rails. In addressing your

Lordships, I myself stated (L. R. 7 H. L. at p. 239) that [*201] "if it had fallen to me to review a verdict *of a jury given against a company under these circumstances, without any evidence to explain the facts, I should have been of opinion that the jury had come to a natural and proper conclusion, but that the only question which your Lordships had to deal with was, Was there evidence of negligence to go to a jury? And that in my opinion there clearly was." And I farther stated (L. R. 7 H. L. at p. 240) that I trusted the case might be found useful in future as negating the idea that, under circumstances such as described, the case was to be withdrawn from the jury.

In the present case, on the other hand, I can find no such evidence, and therefore I feel obliged to move your Lordships that the judgment given for the plaintiff in the Court below should be reversed, and a nonsuit entered, the respondent, according to what is usual in such cases, paying the costs of the appeal along with the costs below.

Lord O'HAGAN: —

My Lords, in this case as it has been presented to your Lordships, the single question is, Was there any evidence which should have been submitted to the jury?

I shall just advert to the judgment in *Bridges v. The North*

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London Railway Company, L. R. 7 H. L. 213, which in the interpretation given to it by some of the learned Judges in the Court below would be decisive against the appellants. I was not a party to that judgment, and I did not hear the statements of opinion addressed to this House by the noble and learned Lords who then advised it, but I have read with great attention the report of those statements, and I quite concur with my noble and learned friend that they established no new principle. They left the law as it was, and as it ought to be. They dealt with the particular circumstances in evidence, and merely decided that as those circumstances plainly justified the imputation of negligence to the company, they should not have been withheld from the consideration of the jury. That case does not seem to me, in any way, to take from the Judge the duty and responsibility of determining as to the existence or non-existence of evidence fit to be considered. It simply affirms a proposition, which no one can dispute, that, when such evidence * exists, the jury must be [* 202] allowed to decide as to its weight and value. Your Lordships have never held that, when negligence is alleged, any state of facts assumed to bear upon the issue can be made the subject of inference by jurors, although not really connected with the issue before them. The consequences of such a doctrine would be disastrous, and it is of high importance that the authority of the Judge should restrain a latitude of decision which might often, in the result, be very inconsistent with reason and justice. I concur, therefore, with the concluding observation of the LORD CHANCELLOR, that the authority of *Bridges v. The North London Railway Company* does not affect, and cannot govern, the case before your Lordships. I have felt it necessary to say so much of that case in the first instance, because it appears to have materially affected the judgment of the Court below, and because I think it ought not, when properly understood, to embarrass your Lordships in considering the evidence in this case, to which I shall now briefly address myself.

The complaint of the respondent is very succinctly put in his declaration. It is confined to this, — that “by the negligence of one of the servants of the defendants one of the doors of the carriage” (in which he was travelling) “was suddenly and violently closed, and thereby one of the thumbs of the plaintiff was smashed and injured.” That is the complaint. It was for the Judge to

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see if anything in the proofs sustained it ; and the same obligation is now cast upon your Lordships.

The material facts are few and undisputed. They have been clearly stated, and I shall not detail them again. It is conceded that at the Gower Street Station three persons got into a compartment which was already full ; that at the Portland Road Station they remained standing up in it ; that the door was opened then, and shut and opened a second time when there was a rush after the train had started ; that a porter put away those who were endeavouring to enter, and closed the door rapidly as the train was entering a tunnel ; and that the respondent, who had risen to prevent the coming in of other passengers, and was thrown forward by the movement, placed his hand on a hinge of the

door to save himself, and had his thumb injured by the [* 203] closing of it. * I gather, by the notes of the learned Judge

who presided at the trial, that some other circumstances were disclosed, but our attention must be confined to those which are set out in the case. Considering these with care, I am unable to come to the conclusion that they establish negligence against the company.

The respondent does not rely upon any single act in proof of negligence. A series of events is taken consecutively, and, from the whole, it is argued that the jury had ground for inferring it. I find it a little difficult to ascertain the precise ground of the judgments we are considering. One of the learned Judges is of opinion that the entrance of the three extra passengers furnishes no evidence of negligence ; and two others appear to have held that none was furnished in the fact that the railway porter “slammed” the door at the time and in the manner at and in which it was closed. Mr. Justice GROVE seems to me to have put the matter fairly when he said, that it must be considered whether the alleged conduct of the company or its servants can be fairly said to have been the cause of the accident ; and I agree with him that it is not necessary to establish negligence, that it should, so to speak, “consist of one act or one negligence only.” “You may put other things together which are reasonably proximate to the accident and come sufficiently near not to be the cause in the very remote sense of the word. And you are not obliged to rely on a single thing, and to say that single thing must be enough to establish negligence.” I quite concur in this ; but I will add that,

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to make them available for that purpose, the several things relied on, or some of them, must be connected with the accident as having more or less contributed to produce it.

Now, take the transaction in its several stages. I do not go so far as Lord Justice AMPHLETT, and say that the appellants were blameless in permitting the intrusion of extra passengers at the Gower Street Station. I think it is conceivable that they might have prevented that intrusion without incurring unreasonable expense or inconvenience, by a rapid inspection of the carriages and the removal of those whom there was not space comfortably to accommodate. It is not necessary to give an opinion upon this point, but I am not prepared to say that if the overcrowding had been connected with the accident as in any way to be its cause, *the company might not have been liable. But [*204] because I fail to find any such connection demonstrated by proof, I cannot say that the liability has arisen. *Ex concessis*, the over-crowding *per se* would have given the respondent no ground for this action, and the subsequent events do not appear to me to make it more effective for that purpose.

The same observation applies to the continuance of the extra passengers in the carriage at the Portland Road Station. It ought not to have been permitted; and, again, I can conceive circumstances in which it might found or aggravate a claim against the appellants. But, like the original overcrowding, I do not think it has been connected with the injury of the respondent as having caused it or contributed to it, and therefore it was not fit to be presented to the jury as a ground for inferring liability. The overcrowding and continuance together may well perhaps be taken to impeach the administration of the company, and give reason for complaint of its arrangements, although, even as to this, I note that some of the learned Judges are of opinion that there was no cause of blame, and we are not required to decide as to the correctness of their views in that respect. But it may not unfairly be conceived that when the case was left at large to the jurors they were not indisposed to take into the account what they might have considered, on public grounds, culpable mismanagement, and attached to the company a responsibility for which, at least in this action, the company was not required to answer.

I am sure that your Lordships would be very slow to limit the legitimate authority of juries in relation to railway cases, for it

furnishes, in its honest and vigorous exercise, the best, and sometimes the only, protection, which the general public possess against the default, shortcoming, or mismanagement of companies. They are potent monopolies, comparatively little subject to the various forms of control which law and opinion exercise upon individuals, and but for the action of juries in preventing negligence and disregard of the general comfort and safety, the want of that control would be a great mischief to society. It is essential, however, to the maintenance and efficiency of the wholesome influence of juries, that it should be confined within its fitting sphere, and prevented from operating without proper cause or on insufficient evidence.

[* 205] * I think there is nothing in evidence which leads to the conclusion that if at Gower Street Station the three passengers had been kept from entering the carriage, or if, at Portland Road Station, they had been excluded from it, the respondent would have escaped the mischief which unfortunately befell him.

All that occurred subsequently was this : Some one opened the door of the carriage and closed it ; the train got into motion and a rush was made, and the door was opened. Who made the rush, whether many or few, does not appear ; but the single porter was adequate to put away those who made it ; and in "slamming" the door as the train entered the tunnel, he surely did nothing but his duty. He did what was right and reasonable, and if he had failed to do it, and evil had resulted from the swinging of the open door in the dark tunnel, there would have been real ground for making his employers answerable in damages. I do not find that any of the learned Judges censure him ; and yet his act seems the only one for which, as having caused the injury, the respondent in his pleading seeks redress against the appellants, and the only one for which, if for anything in this action, they appear to me to be responsible. Can it be said that they were culpable because some one on the platform opened the door and closed it when he saw that the carriage was full ? Can they be held to be so because there was a "rush" of one, or two, or three persons, hurrying to get into the moving train, from which they were kept away by the single porter, after they had opened the door ? Is it possible, dealing with the case reasonably and in the light of our everyday experience, that we can discover negligence in any one of these things. There is nothing in the case to show, as was suggested

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in the Courts below, that there was a large crowd on the platform, or that the staff upon it was insufficient for ordinary purposes. On the contrary, as the LORD CHANCELLOR has already observed, the porter found no difficulty in pushing away the people who had opened the door, and so exercising all the control which apparently was needful under the circumstances.

What more is there in the case? The respondent, as I have said, who had not complained to the porters on the entrance of the extra passengers, and who had not required their removal, rose from his seat and held up his hand to prevent the intrusion of others. *The motion of the train threw him for- [*206] ward, his hand caught at the door, and his thumb was crushed by its closing. His own action, which was natural and reasonable, in combination with the perfectly innocent proceeding of the porter, accomplished the injury, and I wholly fail to see that the overcrowding had anything to do with it. The same occurrence, with the same result, might have taken place if the proper number of passengers had been in the carriage. The opening of the door, the intervention of the porter, the quick slamming, all might have occurred exactly in the same way if the intruders had never entered or had been removed, and the respondent might equally have risen from his seat and held up his hand, as he would have been warranted in doing, to prevent the entry of persons for whom there was no room. Can we speculate as to the amount of added motive to such a course from the greater inconvenience of the greater overcrowding? I think it would be difficult and dangerous to attempt it.

And then we have no proof as to the relative position of the respondent and the other passengers in the carriage, and how far the presence of those who ought not to have been there may have been useful or detrimental to him. It is quite conceivable that one or other of those persons may have been so placed between him and the door as to render the danger less than it otherwise might have been. Again, we cannot speculate, in the absence of proof, or say what might have happened if things had been ordered otherwise. Putting the matter at the lowest, I think your Lordships will be safe in adopting the view of Lord Justice BRAMWELL: "supposing the evidence to be consistent with negligence, namely, that negligence may have caused the matters complained of, it is equally consistent with no negligence, namely, that the matters

proved may have been caused otherwise than by negligence, and it is an elementary rule that when the evidence is consistent as much with one state of facts as with another, it proves neither."

On these grounds I am of opinion that the respondent has failed to establish his claim, or to offer any evidence in support of it which should have been submitted to the jury, and that, therefore, the appeal should be allowed and a nonsuit entered.

[*207] * Lord BLACKBURN: —

My Lords, I also am of opinion that in this case the judgment should be reversed, and a nonsuit entered. On a trial by jury it is, I conceive, undoubted that the facts are for the jury, and the law for the Judge. It is not, however, in many cases practicable completely to sever the law from the facts.

But I think it has always been considered a question of law to be determined by the Judge, subject, of course, to review, whether there is evidence which, if it is believed, and the counter-evidence, if any, not believed, would establish the facts in controversy. It is for the jury to say whether and how far the evidence is to be believed. And if the facts, as to which evidence is given, are such that from them a farther inference of fact may legitimately be drawn, it is for the jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law whether from those facts that farther inference may legitimately be drawn.

My Lords, in delivering the considered judgment of the Exchequer Chamber in *Ryder v. Wombwell*, L. R. 4 Ex. 38, WILLES, J., says: "Such a question is one of mixed law and fact; in so far as it is a question of fact, it must be determined by a jury, subject no doubt to the control of the Court, who may set aside the verdict, and submit the question to the decision of another jury; but there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly find the verdict for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant. It was formerly considered necessary in all cases to leave the question to the jury, if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the

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Judge (subject, of course, to review), is, as is stated by MAULE, J., in *Jewell v. Parr*, 13 C. B. 916, “not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established.”

* He afterwards observes (L. R. 4 Ex. 42), very truly in [* 208] my opinion, “There is no doubt a possibility in all cases where the Judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the Judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the Court below on such a point is reversed, the majority must have been so either in the Court above or the Court below. This is an infirmity which must affect all tribunals.”

I quite agree that this is so, and it is an evil. But I think it a far slighter evil than it would be to leave in the hands of the jury a power which might be exercised in the most arbitrary manner. On this I perfectly agree with the remarks already made by the LORD CHANCELLOR, and I do not repeat them.

My Lords, in all cases of actions to recover damages for a personal injury against railway companies the plaintiff has to prove, first, that there was on the part of the defendants a neglect of that duty cast upon them under the circumstances; and, second, that the damage he has sustained was the consequence of that neglect of duty. A third question, viz., whether the plaintiff is himself to blame comes more properly by way of defence.

Now, in applying the rule of law laid down in *Ryder v. Wombwell*, L. R. 4 Ex. 32, to such cases there had been much difference of opinion among Judges. In some of the cases it was imputed to the Judges who had decided in favour of the companies that they had acted as if a Judge whenever he thought a verdict for the defendant would be unsatisfactory was entitled to withdraw the case from the jury. I do not pause to inquire whether this imputation was just or not. If they did so act, I agree that it was a wrong principle, and I agree also that *Bridges v. The North London Railway Company*, L. R. 7 H. L. 213, is an authority, if one were wanted, to show that it was a wrong principle.

But since the decision of your Lordships' House in *Bridges v. The North London Railway Company*, it has been more than once said in the Courts below that your Lordships had not, perhaps, over-

ruled the law laid down in *Ryder v. Wombwell*, but at least laid down this exception to it, that in cases of railway accidents [* 209] the jurors were to decide. In *Robson v. The North Eastern Railway Company*, 2 Q. B. D. 89, Lord Justice BRETT says: "The House of Lords held that as the carrying of railway passengers was conduct in the ordinary affairs of life, the jury ought to decide." My Lords, I quite agree that this consideration ought never to be lost sight of, but I cannot think it decisive. Lord Justice AMPLETT, in the present case, says: "In considering this question we must bear in mind that it is now settled by the case of *Bridges v. The North London Railway Company* (though previously doubted by many eminent Judges) that the question whether, in cases of this sort, negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the Court or the presiding Judge;" and Chief Justice COCKBURN indicates, I think, at least a partial agreement in this view of that decision.

My Lords, if that was the decision of your Lordships, there would be an end of this case. For I apprehend that after a position of law has been laid down judicially in this House, it is no more competent for your Lordships to depart from it than it would be for an inferior tribunal to do so.

But I own myself unable to see anything in *Bridges v. The North London Railway Company*, which justifies the conclusion that your Lordships either laid down, or meant to lay down, any new rule on the subject. I think the utmost extent to which your Lordships' decision in that case can be fairly pressed is, that in such cases the Judges should be cautious before they say that the jury could not legitimately draw the inference which in fact they did draw; and to this I agree.

My Lords, as to the facts of the present case I have little to say. I think that the plaintiff was entitled to be carried in a carriage with reasonable accommodation, and that there is evidence that at Gower Street, either from there being too few officials, or from these officials neglecting their duty, too many passengers were put in the same carriage with him, and for any damage resulting therefrom he had a case to go to the jury. But I can see no evidence from which the inference could be legitimately drawn that [* 210] the plaintiff's thumb was crushed at Portland Road * because of this neglect of duty at Gower Street. The reason-

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ing by which it is sought to say that the jury might legitimately connect the fact that the plaintiff's thumb was in the hinge of the door at Portland Road with the negligence at Gower Street, seems to me a good example of what Lord BACON means in his *Maxims* when he says: "It were infinite for the law to consider the causes of causes, and their impulsion one of the other." Nor do I see any evidence of negligence at Portland Road. The company, I think, ought to take reasonable steps to prevent people getting into carriages already full, and this the defendants' porter did; but it would be going much farther than I think is reasonable to say that the duty of the railway company was to prevent any one from opening the door in order to look into the carriage and see if there was room. The company's servant did quite right in preventing the persons who did this from entering, and in shutting the door; the misfortune was, that, at the moment he did so, the plaintiff's thumb was in the hinge of the door, but that the porter could not anticipate.

Lord GORDON: —

My Lords, the facts of this case are very simple, and have been very distinctly stated by your Lordships who have preceded me, and it is unnecessary that I should repeat them.

The declaration alleges that the injury sustained by the respondent was caused by the negligence of one of the servants of the defendants, in suddenly and violently closing one of the doors of the carriage in which the plaintiff was being conveyed; and the question now before your Lordships is, whether there was evidence of negligence given at the trial to go to the jury.

The duty of a Judge in such a case is an exceedingly delicate one, as the line of division between what is proper to be submitted to the jury, as necessary to support a charge of negligence in point of law, and what may be submitted to the jury as sufficient to support a charge of negligence in point of fact, is often a very narrow one. But I agree in what was said by Mr. Justice WILLES, in the case of *Ryder v. Wombwell*, L. R. 4 Ex. 32, at p. 38, which has been quoted by Lord BLACKBURN, that "there is in every case a preliminary question, * which is one of law, namely, [* 211] whether there is any evidence on which the jury could properly find the question for the party on whom the *onus* of proof lies. If there is not, the Judge ought to withdraw the question from

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the jury, and direct a nonsuit if the *onus* is on the plaintiff, or direct a verdict for the plaintiff if the *onus* is on the defendant.”

In the case of *Bridges*, which has also been referred to by your Lordships, Mr. Baron POLLOCK, one of the consulted Judges, after referring to what I have just quoted from Mr. Justice WILLES, in the case of *Ryder*, says, and I concur with him (L. R. 7 H. L. at p. 221), “This is a clear exposition of the rule, and it has been generally acquiesced in and acted upon, and it follows from it that although the question of negligence is usually one of pure fact, and therefore for the jury, it is the duty of the Judge to keep in view a distinct legal definition of negligence as applicable to the particular case, and if the facts proved by the plaintiff do not, whatever view can be reasonably taken of them, or inference drawn from them by the jurors, present an hypothesis which comes within that legal definition, then to withdraw them from their consideration.”

In the present case I must say that during the argument I felt much inclined to agree with the view taken of the decision of this House in the case of *Bridges* by the LORD CHIEF JUSTICE, and Lord Justice AMPHLETT, and to hold that it had been settled by that case, that the question whether negligence can be inferred from a given state of facts, is itself a question of fact for the jury, and not a question of law for the presiding Judge. But having considered that case more maturely, with the assistance which your Lordships have received from his Lordship on the woolsack, who took part in that decision in this House, I am now satisfied that the view taken by these learned Lords was not the right one, and that no fixed or general rule, such as was supposed by these learned Lords, was laid down by the case of *Bridges*. I concur with your Lordship on the woolsack in thinking that it is impossible to lay down any rule, except that from any given state of facts the Judge must say whether negligence can be legitimately inferred, and if the Judge is of that opinion, then that it is for the jury to say whether it ought to be inferred.

[* 212] * On the state of the facts before the House in the present case, I come to the conclusion that no negligence, connected with or conducing to the accident, was proved on the part of the appellants, and that the Judge who tried the case ought to have so ruled. I think the overcrowding of the carriage was not the cause of the accident, and the respondent does not se

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allege in his declaration. The people who were overcrowding were inside the carriage and did not require to open the door at Portland Road, where the accident happened. The door was opened there by people on the outside who tried to get in. The porter prevented them, and I think did so rightly. The respondent, who had a seat, rose or partly rose to push the people back who were trying to enter. The train happened to move on, the respondent was jerked forward, and put his hand on the hinge of the carriage-door, at the very moment the door was in course of being shut by the porter, and the respondent's thumb was injured. It was the duty of the porter to shut the door. It is not proved that he saw the respondent fall forward, or could have prevented the jamming of his thumb. I think there is no evidence of negligence in what took place at Portland Road, and that what happened was a pure accident, for which the appellants were not responsible; and that the Judge who tried the case should have so ruled.

I therefore concur in thinking that the judgment given for the respondent in the Court below should be reversed.

Judgment given for the plaintiff in the Court below reversed, and a nonsuit to be entered; respondent ordered to pay to the appellants the costs of the appeal and the costs in the Court below.

Lords' Journals, 13th December, 1877.

The Douglas.

7 P. D. 151-161 (s. c. 51 L. J. Adm. 89, 47 L. T. 502).

Evidence of Negligence. — Collision with Wreck. — Duty of Owners of Wrecked Vessel. — Notice to Harbour-master.

The *D.*, in consequence of the sole default of her master and crew, had [151] sunk in the Thames, and had become a wreck obstructing the navigation of the river. Her mate sent a message to the harbour-master at G. to inform him of the accident, who said that he would cause the wreck to be lighted. A few hours afterwards, the wreck not having been lighted, a vessel, without any fault on the part of those on board her, came into collision with the wreck and sustained damage. An action of damage having been instituted on behalf of the owner of the damaged vessel against the owners of the *D.*, the judge at the trial refused to admit the evidence showing that the mate of the *D.* had sent a message to the harbour-master, and that the latter had promised to light the wreck:—

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Held, that the evidence was wrongly rejected, that the collision had not been caused by the negligence of the owners of the wreck, and that they were not liable for the damage done.

This was an action of damage brought by the owners of the steamship *Mary Nixon* against the steamship *Douglas* and her freight.

The statement of claim alleged that shortly after midnight on the 27th of October, 1881, the *Mary Nixon* was proceeding up the river Thames about mid-channel in Gravesend Reach with her regulation lights exhibited and a proper look-out, when she struck against one of the masts of the *Douglas* as that vessel was lying, a sunken wreck, in a position obstructing the navigation of the river, and thereby suffered considerable damage; that the collision was not contributed to by any negligence on the part of those in charge of the *Mary Nixon*, whilst no lights or warning of any sort were exhibited on or near the wreck of the *Douglas*, and there was nothing to warn those on board the *Mary Nixon* of the wreck. The statement of claim further alleged that it was by reason of the negligence of those in charge of the *Douglas* in coming into collision with two vessels, called respectively the *Duke of Buckingham*

and the *Orion*, that the *Douglas* sank in the position she [* 152] lay * in when the *Mary Nixon* came into collision with her, and attributed negligence to the defendants, the owners of the *Douglas*, for not taking means to warn approaching vessels of the position of the wreck.

The defendants delivered a statement of defence, and therein, after admitting that the *Douglas* had sunk in consequence of a collision with the *Duke of Buckingham*, and that that collision had been caused by the negligent navigation of the *Douglas*, but alleging that afterwards a white light had been placed in the main rigging of the *Douglas*, and remained there until the *Douglas* sank, raised the defence that after the *Douglas* sank and before the *Mary Nixon* struck upon the wreck, a reasonable time to exhibit lights as a warning in or near the wreck had not elapsed, that the *Mary Nixon* had been sufficiently warned of the position of the wreck by hailing; and in the alternative that "at the time when the *Mary Nixon* struck the *Douglas*, the *Douglas* was a wreck lying sunk on the bed of the river Thames, and that before and at the time when the *Mary Nixon* struck the *Douglas*, the defendants

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had wholly ceased to have the possession, management, or control of the same."

April 18. The action was heard before the judge of the Admiralty Division, assisted by two of the Elder Brethren of the Trinity House.

Witnesses were examined on behalf of the plaintiff and of the defendants. From the evidence of the witnesses it appeared that the *Mary Nixon* had struck the wreck of the *Douglas* about six hours after the *Douglas* had sunk, and that at that time the officers of the Thames Conservancy had not taken possession of her.

It was proposed to be proved on behalf of the defendants by the evidence of the captain of a tug called the *Endeavour*, that warning was given to the harbour-master at Gravesend, and that the harbour-master said that the proper wreck-lights would be immediately sent to the *Douglas*, and that the statement of the harbour-master was reported to one of the officers of the *Douglas*. This evidence was objected to by the plaintiff on two grounds; first, that it was hearsay evidence; and secondly, that it was

* immaterial, inasmuch as the defendants could not dele- [* 153]
gate the duty of guarding the wreck to the harbour-master.

The Court rejected the evidence on its being tendered. It appeared, however, from the examination in writing of Griffith Williams, the mate of the *Douglas*, that he instructed the master of the tug called the *Endeavour* to report the sinking of the *Douglas* to the harbour-master, and that shortly afterwards the captain of the *Endeavour* reported to him that the harbour-master had said that he would send down something in the course of an hour. It further appeared from the defendant's answers to interrogatories, that they had never abandoned their interest or ownership in the *Douglas*, and that they still claimed to be her owners. The other facts are sufficiently noticed in the judgments hereafter set out.

Butt, Q. C., and G. Bruce, for the plaintiff. The *Mary Nixon* would never have struck the wreck, if the *Mary Nixon* had been warned of the position of the wreck in sufficient time for her to avoid running into it; the duty of warning the *Mary Nixon* clearly lay on the defendants, as the sinking of the *Douglas* was brought about solely by the negligence of their own servants. *Brown v. Mallett*, 5 C. B. 599, 17 L. J. C. P. 227; *White v. Crisp*, 10 Ex. 312, 23 L. J. Ex. 317; *Harmond v. Pearson*, 1 Camp. 515. In

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these circumstances the defendants must be held to be alone to blame for the damage done to the *Mary Nixon*. At the time the damage was done, they had not abandoned the possession or management of the wreck, and it was incumbent on them after the *Douglas* had sunk "to use reasonable skill and care to prevent mischief to others," just as much as it was their duty to do so when this vessel was afloat. It is not as if it had been impracticable for the defendants to place a light near the wreck, or otherwise to warn the *Mary Nixon* of her danger.

Myburgh, Q. C., and Bucknill, for the defendants. At the time of the accident to the *Mary Nixon*, the defendants had not the power of exercising and were not in fact exercising any possession, management, or control over the wreck of the *Douglas*, and if any duty then existed under which a light ought to have been placed to mark the position of the wreck, it was a duty to be performed [* 154] at the discretion of the Thames Conservancy, and for the non-performance of which the defendants ought not to be liable.

Butt, Q. C., in reply.

Cur. adv. vult.

April 25. Sir ROBERT PHILLIMORE.—This is an action for damages in consequence of a collision between the screw steamship *Mary Nixon* and another screw steamship, called the *Douglas*. It occurred in Gravesend Reach, at midnight on the 27th of October, 1881. The *Douglas* had previously come into collision with the steamship the *Duke of Buckingham*, and had in consequence sunk. It is admitted that the collision with the *Duke of Buckingham* was due to the negligent navigation of the *Douglas*. At the time of the collision between the *Mary Nixon* and the *Douglas*, the *Douglas* was lying sunk in the river, about mid-channel, with one of her masts above the water. The contention of the *Mary Nixon* was that it was the duty of the *Douglas* to warn approaching vessels of the wreck, and that no such warning was given, and therefore that she was responsible for the damage. The defence of the *Douglas* is that a white light was placed in her main rigging within a reasonable time; that the *Mary Nixon* was warned by hailing from another vessel in sufficient time to enable her to avoid the *Douglas*, and, as an alternative defence, that the defendants had wholly ceased to have possession, management, or control of the *Douglas*, and therefore were not responsible.

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To deal first with the facts, I am of opinion that no hailing on the part of the *Douglas* is proved. I have consulted the Trinity Masters, and I agree with them, that a reasonable time had elapsed between the collision with the *Duke of Buckingham* and the collision with the *Mary Nixon*, for giving some warning to approaching vessels of the position of the *Douglas*, and that the means of such warning could have been obtained without difficulty. It appears that a light was put up in the main rigging of the *Douglas* after the collision with the *Duke of Buckingham*, which light remained till the *Douglas* sank; but at the time of the collision with the *Mary Nixon* no light appears to have been exhibited, and no kind of warning given. I have now to deal with the question of law arising on these facts. The plaintiff contends that the *Douglas*, * having had her lights knocked out by the pre- [* 155] vious collision, was bound to adopt some measures of warning, by lights or otherwise, to approaching vessels. The defendants say, that no persons being left on board the *Douglas*, it was not the duty of any private person to give such warning, but that it became a matter for the intervention of public authority; that during the period between the crew leaving the ship and the intervention of the public authority, the risk, however great, must be borne by the public; that in this case, although there was an *animus revertendi*, still the control and possession of the ship had been given up. I confess I listened to this argument with great alarm. The consequences of such a doctrine are fraught with danger to the interests of navigation, and also to human life. It is, however, not necessary, in the view which I take of this case, to decide the exact point when the private obligation ends and that of the public authority begins. Two cases were relied upon: *Brown v. Mallett*, decided in 1848, 5 C. B. 599, 17 L. J. C. P. 227, and *White v. Crisp*, decided in 1854, 10 Ex. 312, 23 L. J. Ex. 317. The principle of law applicable to cases of this description appears to me to be contained in the judgment of ALDERSON, B., in *White v. Crisp*, citing the opinion of MAULE, J., in *Brown v. Mallett*, in which it is laid down that "it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others;" and he adds, that his liability "is the same, whether his vessel be in motion or stationary, floating or aground, under water or above it." Now, in my opinion, it has been proved

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that the possession, management, and control of the *Douglas* were not abandoned by her master and crew, and, consequently, that the duty, which ALDERSON, B., referred to in the passage that I have quoted, continued a duty on their part up to the time of the collision with the *Mary Nixon*. I must therefore pronounce that the *Douglas* is alone to blame for the collision with the *Mary Nixon*.¹

The defendants appealed.

[* 156] * Bucknill, for the defendants. The evidence as to the message sent by the mate of the *Douglas* to the harbour-master at Gravesend was wrongly rejected; it was admissible as tending to disprove negligence on the part of those representing the defendants.

Butt, Q. C., and G. Bruce, for the plaintiff. The conversation between the harbour-master and the captain of the tug *Endeavour* was not admissible: it was merely hearsay evidence. And, further, it was immaterial. The captain and the mate of the *Douglas* could not delegate their duty to take proper care of the wreck to the harbour-master; they did not on behalf of the defendants abandon it. It is not the harbour-master's duty to take possession of the wreck; he is merely authorised to remove it. The defendants were as much bound to light the wreck as if they had contracted to do so; a legal duty was imposed upon them. They were guilty of causing an obstruction in a navigable river by leaving the wreck in it, and it does not appear that the harbour-master affixed lights to the wreck. The defendants certainly gave no notice to the plaintiff's vessel where the wreck was lying. It is true that by the Thames Conservancy Act, 1857 (20 & 21 Viet. c. cxlvii), sects. 86, 87, power was given to the conservators to remove vessels obstructing the navigation of the river, and by the Removal of Wrecks Act, 1877 (40 & 41 Viet. c. 16), sect. 4, a conservancy authority "may" remove any vessel that is sunk, stranded, or abandoned, and "may" light or buoy her until removal; but the powers conferred by the latter Act are merely permissive, and not obligatory, and some delay must take place even if the conservancy

¹ The 9th Article of the bye-laws for the Regulation of the Navigation of the River Thames, approved by Order in Council of the 18th of March, 1880, and published in the London Gazette, Friday, 19th of March, 1880, p. 2135, provides "that all vessels when employed to mark the positions of wrecks or other obstructions shall exhibit two bright lights placed horizontally not less than six nor more than twelve feet apart."

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acted under the power of this statute. It is no defence that the harbour-master was asked to put up a light on the wreck.

[BRETT, L. J. The Removal of Wrecks Act, 1877, relates to the performance of a public duty. Is not the word “may” in sect. 4 to be read “must?”]

It follows from the reasoning of the Court of Common Pleas in *Brown v. Mallett*, 5 C. B. 599, 17 L. J. C. P. 227, and of the Court of Exchequer in *White v. *Crisp*, 10 Ex. 312, [*157] L. J. Ex. 317, that the defendants are liable for leaving the wreck of the *Douglas* sunk in the Thames without giving any warning to approaching vessels. It is unnecessary to say that any one of the crew was guilty of negligence in not affixing a light after the vessel had sunk; but the mate might have done so. It was an act of negligence to leave the wreck of the *Douglas* without a light; the act of lighting the wreck was merely discretionary on the part of the Thames Conservancy: *Forbes v. Lee Conservancy Board*, 4 Ex. D. 116; *The Ettrick*, 6 P. D. 127, and the mate of the *Douglas* was not justified in assuming that the Thames Conservators would by the harbour-master perform it. The mate might have obtained a boat and himself might have affixed a light to the wreck.

Bucknill was not called upon to reply.

LORD COLERIDGE, C. J. — It seems plain to me that the judgment of the Admiralty Division cannot be supported. Two courses are open to us: we can either send the case back for a new trial, or pronounce judgment upon the materials before us. As the evidence was not given, and it is not certain what it would turn out to be, we could only grant a new hearing if the rejection of the evidence tendered were the only matter which we had to determine; but upon the facts before us we can reverse the judgment of the Admiralty Division, and enter judgment for the defendants.

The only question upon the evidence before us is whether the defendants were guilty of negligence; of course I am not speaking of the original negligence conducing to the original collision. It appears from all the facts that there was no negligence of which the plaintiff can take advantage. There was a collision between the *Douglas*, the *Duke of Buckingham*, and the *Orion*, and afterwards between the *Douglas* and the *Mary Nixon*. After the *Douglas* had been sunk, a light was fixed in her rigging. The

master of the *Douglas*, having been thrown into the water, was taken in a boat to near Gravesend. Then the tug called the *Endeavour* went to Gravesend; there the mate instructed the captain to go to the harbour-master and to request him to take care of the wreck. The defendants caused the captain of [*158] the **Endeavour* to be called as a witness. The counsel for the plaintiff objected that the conversation between the harbour-master and the captain of the *Endeavour* took place behind the back of the plaintiff, and therefore could not be received in evidence. The Judge of the Admiralty Division excluded it. The objection has not been seriously supported to-day; for the evidence was tendered as relating to an act done and tending to disprove negligence, a competent person having been sent to inform the harbour-master. It was urged that the evidence was immaterial, because the master and the mate of the *Douglas* had no right to delegate their duty to take due and proper care of the wreck to the harbour-master; for it appears clear that the defendants still claimed to be owners of it. The evidence was not immaterial. I think that it was wrongly rejected. But it was stated to the mate of the *Douglas* that the harbour-master had undertaken to light the wreck; there was therefore evidence that the mate who represented the defendants thought that the harbour-master had undertaken to light the wreck. The harbour-master *may* exercise the powers of the Removal of Wrecks Act, 1877, and it is unnecessary to give any opinion as to the construction of the Act, and to determine whether he *must*; for having the power he appears to have undertaken to do the duty. It is to go too far to say that the captain and the mate of the *Douglas* were guilty of negligence; for even upon the present facts it must be inferred that the mate asked the official to do that which he had the power by statute to perform. It has been argued that an action is maintainable, because it does not appear that the harbour-master performed the duty; but it must be inferred upon these facts that he undertook to do the duty, and at least the mate of the *Douglas* had fair ground for supposing that he would perform it. The master and the mate of the *Douglas* had no power to retain the *Endeavour* to light the wreck. No act has been pointed out which they might be fairly expected to do. The evidence was improperly rejected, but sufficient evidence is before us to show that all things reasonable were done; there is no

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ground for finding that the master and the mate of the *Douglas* were guilty of actionable negligence.

I think it unnecessary to discuss the two cases which have been * mentioned, *Brown v. Mallett*, 5 C. B. 599, 17 [* 159] L. J. C. P. 227, and *White v. Crisp*, 10 Ex. 312, 23 L. J. Ex.

317. I entertain a great respect for the learned Judges who decided them; but I do not think that they trench upon our decision, for they assume that the possession and the control over the sunken ship must remain in the owners in order to render them liable; these cases may be good law, for in *Brown v. Mallett* it was held that the owner of the barge was exempt from liability on the ground that the declaration did not show him to be in possession at the time of the damage to the plaintiff's steamship, and in *White v. Crisp* the action was founded on the circumstance that the defendants had the possession and the control of the wreck.

Upon the grounds that I have stated, I am of opinion that the materials before us show that the judgment of the Admiralty Division must be reversed.

BRETT, L. J. — This is an action to recover damages for the injury occasioned to the plaintiff's steamship the *Mary Nixon* by the negligence of those in charge of the defendants' steamship, the *Douglas*. The facts may be shortly stated as follows: the *Douglas*, whilst going up the Thames, came into collision with another vessel, the *Duke of Buckingham*, and sank; the collision was due to the negligence of those on board the *Douglas*; a light was fixed in her riggings, but it was extinguished upon her sinking. The mate of the *Douglas* went up to Gravesend and requested the captain of the tug called the *Endeavour* to ask the harbour-master to fix some lights on the wreck; the harbour-master said that he would do this, and his answer was reported to the mate of the *Douglas*. Before any lights were fixed to the wreck, the plaintiff's steamship in passing up the river struck against the sunken wreck of the *Douglas*, and sustained the injury in respect of which this action is brought. The liability of the defendants was alleged to exist upon three grounds. First, it was said by the plaintiff's counsel that a duty was imposed upon the defendants to light the wreck, that the duty was of the same nature as if the defendants had contracted with the plaintiff to light it, and that they are absolutely liable for the breach of it; this really seems to me to be

almost the same as to argue that there was a contract: [*160] * the contention is quite unsustainable, no duty at least of that description can exist. Secondly, it was assumed in the argument that the defendants had committed an indictable offence in the channel of a navigable river; that was the effect of the argument addressed to us, although this contention was not put forward in direct terms. To wilfully scuttle a ship in a tide-way so as to cause an obstruction may possibly be an indictable offence; but what the defendants did was no indictable offence. Their own ship sank. It seems to me clear that no greater liability can exist against the defendants than if their steamship had sank without negligence. What is the liability of the owners of a sunken ship which is lying in a tide-way? if they keep possession of her, they must give notice where she has gone down. This is all their liability. Thirdly, it was said that the defendants did not take care to give notice where the wreck of the *Douglas* was lying. I incline to agree that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is *primâ facie* to act; it is for the plaintiff to prove that there was negligence. The captain appears to have gone ashore after the *Douglas* sank: what was he to do? he was not guilty of negligence. As to the mate, he gave instructions to the captain of the tug *Endeavour* to inform the harbour-master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the *Douglas* had a right to assume that the harbour-master would do what he promised. Upon the evidence before us, there was no negligence and no liability upon the defendants. The judgment of the Admiralty Division cannot be supported. I say nothing as to *Brown v. Mallett*, 5 C. B. 599, 17 L. J. C. P. 227, and *White v. Crisp*, 10 Ex. 312, 23 L. J. Ex. 317, except that they were decided on demurrer.

COTTON, L. J. — I think that the evidence was improperly rejected. Under the Removal of Wrecks Act, 1877, sect. 4, the harbour-master had power to put up lights, and I think it became his duty to remove a dangerous obstruction. In my [*161] opinion, the * evidence, if it had been received, would

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have shown that the defendants had for the time abandoned the control of the wreck. There was therefore a wrongful rejection of evidence; but I agree that there ought not to be a new trial, for it is proved by the deposition of the mate of the *Douglas* that the collision was reported to the harbour-master, and that the mate did receive a communication from the harbour-master. This circumstance exonerates the defendants from the charge of negligence, for it gave the harbour-master notice to perform the duty. The plaintiff cannot say that the injury to his steamship, the *Mary Nicon*, was occasioned by the defendants' wrongful act; his loss did not happen through their negligence.

Judgment reversed.

ENGLISH NOTES.

The judgment of ERLE, Ch. J., in *Cotton v. Wood* (1860), 8 C. B. (N. S.) 568, 29 L. J. C. P. 333, 7 Jur. (N. S.) 168, has been frequently cited. That was an action for negligent driving, arising from a woman being run down and killed by an omnibus. She had attempted to cross the street — not in an ordinary crossing place — in a dark night with snow falling fast. She had passed in front of the omnibus, which was going on its proper side at a moderate pace, but, being alarmed by another vehicle coming on the other side of the street in the opposite direction, had turned back and was knocked down by the omnibus. A rule for a new trial — after a verdict for the plaintiff — having been argued, ERLE, Ch. J., said: “The plaintiff is not entitled to succeed unless there be affirmative proof of negligence on the part of the defendant or his servant; and there can be no such proof, unless it be shown that there existed some duty owing from the defendant to the plaintiff, and that there has been a breach of that duty. Now, I am utterly at a loss to find any evidence of any breach of duty here. It is as much the duty of foot-passengers attempting to cross a street or road to look out for passing vehicles, as it is the duty of drivers to see that they do not run over foot-passengers. Where it is a perfectly even balance upon the evidence whether the injury complained of has resulted from the want of proper care on the one side or on the other, the party who founds his claim upon the imputation of negligence fails to establish his case.”

In *Hammack v. White* (1862), 11 C. B. (N. S.) 588, 31 L. J. C. P. 129, 8 Jur. (N. S.) 796, 5 L. T. 676, 10 W. R. 230, the defendant, having bought a horse at Tattersalls, was trying him in a public thoroughfare. From some unexplained cause, the horse became restive, and, notwithstanding the defendant's well-directed efforts to control him,

got upon the pavement and killed a man. It was held, in an action under Lord Campbell's Act, that there was no evidence of negligence to make the defendant liable. *Primâ facie*, it was observed, a man found riding on the pavement is in the wrong; but the witness that proved that showed that the defendant was there against his will. "A man is not," said ERLE, Ch. J., "to be charged with want of caution because he buys (and rides) a horse without having had any previous experience of him."

In *Byrne v. Boodle* (1863), 2 Hurl. & Colt. 722, 33 L. J. Ex. 13, 9 L. T. 450, 12 W. R. 279, the plaintiff, walking in a public street, was hurt by a barrel of flour falling out of a window above the defendant's shop. This was held *primâ facie* evidence of negligence in the defendant.

The same principle was applied in *Scott v. London and St. Katharine Docks Co.* (Ex. Ch. 1865), 3 Hurl. & Colt. 596, 34 L. J. Ex. 220, 11 Jur. (N. S.) 204, 13 L. T. 148, 13 W. R. 410. The plaintiff who had suffered the injury was a custom-house officer, who, though not in a public place, was where he had a right to be in the performance of his duty.

The judgment of the majority in *Briggs v. Oliver* (1866), 4 Hurl. & Colt. 403, 35 L. J. Ex. 163, 14 L. T. 412, 14 W. R. 658, followed *Byrne v. Boodle*, *supra*, and *Scott v. London and St. Katharine Docks Co.*, *supra*. This was a case where a person making inquiries at the door of defendant's offices was hurt by the fall of a packing case which admittedly belonged to the defendant and had been reared against the wall of the building. It was held by PIGOTT, B., and BRAMWELL, B., *diss.* MARTIN, B., that there was evidence of negligence on the part of the defendant.

The duty of a railway company to provide safe bridges and staircases for the use of passengers at their stations is illustrated by the cases of *Longmore v. Great Western Railway Co.* (1865), 35 L. J. C. P. 135, and *Crafter v. Metropolitan Railway Co.* (1866), L. R. 1 C. P. 300, 35 L. J. C. P. 132, 14 W. R. 334. In the former, the plaintiff was held entitled to maintain the verdict of a jury to the effect that the company were responsible for the danger caused by leaving an open space between a staircase and hand rail on the way up to the bridge; and in the latter, they were held not responsible for an accident caused by the passenger slipping on a brass nosing to a wooden step.

In *Welfare v. London and Brighton Railway Co.* (1869), L. R. 4 Q. B. 693, 38 L. J. Q. B. 241, 20 L. T. 743, 17 W. R. 1065, the Judges COCKBURN, Ch. J., MELLOR, J., LUSH, J., and BLACKBURN, J., concurred in supporting a nonsuit. An intending passenger by a railway, looking at the time-tables at the station, was hurt by a plank and roll of zinc

falling through the roof of a portico, where there was a man presumably engaged in repairing the roof or inspecting it for that purpose. It was observed in all the judgments that the presumption was that the repairs were being looked after by a contractor and not by the company; but, independently of that, they considered there was no evidence of negligence. In this point of view, it is difficult to see the distinction between the case and *Scott v. London and St. Katharine Docks Co.*, *supra*.

In *Kearney v. London, Brighton, and South Coast Railway Co.* (1870 & 1871), No. 9, *post* (L. R. 6 Q. B. 759, 40 L. J. Q. B. 285, 24 L. T. 913, 20 W. R. 24), the fact of the falling brick was held evidence to go to a jury of negligence; because the railway company were under the duty, as regards persons passing along the highway, to use care in keeping the bridge in repair.

In *Manzoni v. Douglas* (1880), 6 Q. B. D. 145, 50 L. J. Q. B. 289, 29 W. R. 425, a horse, with a brougham, bolted without any assignable cause, and injured the plaintiff who was on the foot pavement. The Common Pleas Division, following *Hammack v. White*, *supra*, held that there was no evidence of negligence to go to the jury. The Court distinguished the case from *Byrne v. Boodle* and *Scott v. London and St. Katharine Docks Co.*, on the ground that in those cases the damage was caused by an inanimate thing, the movement of which was presumably under control of the defendants, whereas the sudden freaks of an animal are not so. They distinguished the cases of *Michil v. Alestree* (1677), 1 Vent. 295, and *Simson v. London General Omnibus Co.* (1873), L. R. 8 C. P. 390, 42 L. J. C. P. 112, 38 L. T. 560, 21 W. R. 595, on the ground that there was knowledge, or evidence of knowledge, in the defendants of an unruly nature, or of vice, in the animal.

In *Snook v. Grand Junction Waterworks Co.* (1886), 2 Times Rep. 308, the plaintiff sought to recover damages from the flooding of his cellar by water escaping from the defendant's mains. Mr. Baron HUNDLESTONE, who tried the case, on its being proved that the escape of water proceeded from a fracture in the main, held that there was *prima facie* evidence of negligence; but on its being proved by the water company that the pipes were reasonably sufficient, and that the fracture was of a nature showing that it arose from some cause, such as change of temperature, which could not by any known means be guarded against with certainty, he held that negligence was not established; and that — the case being taken out of the rule of *Rylands v. Fletcher*, 1 R. C. 236, by the statutory powers of the company — the defendants were not liable.

On the question of proximate cause: a case where the immediate connection of the negligent act and the damage, as cause and effect, is not at first sight obvious, is *Burmes v. March Gas and Coke Co.* (Ex.

Ch. 1872), L. R. 7 Ex. 96, 41 L. J. Ex. 46, 26 L. T. 318, 20 W. R. 493. The defendants, the gas company, having contracted to supply the plaintiff with a service pipe from their main to the metre on his premises, laid down a defective pipe, from which the gas escaped. A workman, in the employ of a gasfitter, engaged by the plaintiff to lay down pipes upon his premises, negligently took a lighted candle for the purpose of finding out whence the escape proceeded. An explosion took place, whereby damage was occasioned to the plaintiff's property. It was held that the plaintiff was entitled to recover the damage from the gas company. This was a case of contract: but, on the question of proximate cause, the decision would be equally applicable to an action in tort arising from negligence. The ground of the decision was that a dangerous accumulation of gas was the necessary consequence of the defendants' act, and an explosion the probable consequence. That the danger developed into an actual explosion through the negligent act of a third person does not prevent the original cause of danger being regarded in law as the proximate cause of the damage. The principle is the same with that of the well-known case of *Scott v. Sheppard*, 1 Smith's Lead. Cas., where a squib thrown by defendant, and picked up and thrown about by others, ultimately damaged the plaintiff's eye. Other cases of wilful wrong or negligence illustrating the same principle are *Hill v. New River Co.* (Q. B. 1868), 18 L. T. 355; *Collins v. Middle Level Commissioners* (1869), L. R. 4 C. P. 279, 38 L. J. C. P. 236, 20 L. T. 442, 17 W. R. 929; *Bailiffs of Romney Marsh v. Trinity House Corporation* (1870), L. R. 5 Ex. 204, 39 L. J. Ex. 163, 22 L. T. 446, 18 W. R. 869; *Lawrence v. Jenkins* (1873), L. R. 8 Q. B. 274, 42 L. J. Q. B. 147, 28 L. T. 406, 21 W. R. 577; *Sneesby v. Lancashire and Yorkshire Railway Co.* (1874), L. R. 9 Q. B. 263, 43 L. J. Q. B. 69, 30 L. T. 492 (affirmed C. A. 1875), 1 Q. B. D. 42, 45 L. J. Q. B. 1, 33 L. T. 372, 24 W. R. 99; *The Sisters* (C. A. 1876), 1 P. D. 117, 45 L. J. P. D. & A. 39, 34 L. T. 338, 24 W. R. 412; *Firth v. Bowling Iron Co.* (1878), 3 C. P. D. 254, 47 L. J. C. P. 358, 38 L. T. 568, 26 W. R. 558; *Clark v. Chambers* (1878), 3 Q. B. D. 327, 47 L. J. Q. B. 427, 38 L. T. 454, 26 W. R. 613 (No. 14, *post*); *Harris v. Mobbs* (1878), 3 Ex. D. 268, 39 L. T. 164, 27 W. R. 154; *Wilkins v. Day* (1883), 12 Q. B. D. 110, 49 L. T. 399, 32 W. R. 123.

Cases on the other hand where the damage claimed could not be referred to the alleged negligent act as its proximate cause, are: *Peacock v. Young* (1869), 18 W. R. 134; *Sharp v. Powell* (1872), L. R. 7 C. P. 253, 41 L. J. C. P. 95, 26 L. T. 436, 20 W. R. 584; *Hobbs v. London & South Western Railway Co.* (1875), L. R. 10 Q. B. 111, 44 L. J. Q. B. 49, 32 L. T. 352, 23 W. R. 520; *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453, 44 L. J. Q. B. 139, 33 L. T. 475.

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Besides the principal case of *Metropolitan Railway Co. v. Jackson*, there have been many other cases arising from hands crushed by shutting the door of a railway carriage. The following may be referred to: *Fordham v. London, Brighton, & South Coast Railway Co.* (1868, 1869), L. R. 3 C. P. 368, L. R. 4 C. P. 619, 37 L. J. C. P. 176; *Muddor v. London, Chatham, & Dover Railway Co.* (1878), 38 L. T. 458; *Cohen v. Metropolitan Railway Co.* (1890), 6 Times Rep. 146. In *Fordham v. London, Brighton, & South Coast Railway Co.*, there was evidence that the guard shut the door before the plaintiff had got completely in. The case was left to the jury, who found for the plaintiff. The verdict was maintained by a majority in the Common Pleas, and the judgment was unanimously affirmed in the Exchequer Chamber. In the two other cases, the passenger had got completely into the carriage, and there was evidence to show that he was seen to have his hand in the door: it was held that there was no evidence of negligence.

Where a railway company has omitted to perform a statutory duty imposed for (with or without other objects) the avoidance of danger to the public, it seems sufficient to infer liability that the facts point to the omission as a probable cause of the injury, although other causes might be suggested. Thus, where a railway company had neglected to erect, as required by statute, a gate or stile across a public footpath which crossed the railway on the level, the fact of a child of tender years being found on the level crossing with a foot cut off by a passing train was held sufficient to infer liability on the part of the railway company. *Williams v. Great Western Railway Co.* (1874), L. R. 9 Ex. 157, 43 L. J. Ex. 105, 31 L. T. 124, 22 W. R. 531. This case was distinguished in *Wakelin v. London and South Western Railway Co.* (H. L. 1886), 12 App. Cas. 41, 56 L. J. Q. B. 229, 55 L. T. 709, 35 W. R. 141, where a person was found killed on the line near a level crossing. It did not appear that any statutory precaution had been neglected; and the only suggestion of negligence was that the watchman employed by the company to take charge of the gates by day, was withdrawn at night.

The Irish case of *Dublin, Wicklow, and Wexford Railway Co. v. Slattery* (H. L. 1878), 3 App. Cas. 1155, 39 L. T. 365, 27 W. R. 191, arose out of the death of a person who, in a clear night, after crossing the line of the up-trains behind a train which was just starting, was knocked down and killed by the down express on the other line. It was a rule of the railway that the express train should always sound the whistle on approaching the station; and there was conflicting evidence whether the whistle had been sounded or not. At the trial the case had been left to the jury, who found for the plaintiff. It was held by the House of Lords by a majority (Lord CAIRNS, C., Lord PEN-

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ZANCE. Lord O'HAGAN, Lord SELBORNE, and Lord GORDON; *diss.* Lord HATHERLEY, Lord COLERIDGE, and Lord BLACKBURN) that there was evidence to go to the jury and that (the only question on the appeal being whether there was any evidence which should have been left to the jury) the plaintiff was entitled to hold his verdict.

The decision of *Dublin, Wicklow, and Wexford Railway Co. v. Slattery* was cited and followed in *Wright v. Midland Railway Co.* (1884), 51 L. T. 539, 544, where the chief suggestion of negligence was that it was usual at the station for a porter to stand at the level crossing to warn persons not to cross when a train was coming in, and this was not done on the night in question. Another case of a somewhat similar character, and similarly decided, was *Brown v. Great Western Railway Co.* (1885), 1 Times Rep. 406. In another case, *Bettany v. Waine* (1885), 1 Times Rep. 588, under the Employer's Liability Act, it was proved that the defendants' servants had created a danger by the removal of part of a platform which guarded a shaft in a coal mine. The deceased, a workman in the colliery, had fallen through the opening. The widow had a verdict, and the Judges of the Queen's Bench Division held she was entitled to maintain it. Lord COLERIDGE, referring to the case of *Dublin, Wicklow, and Wexford Railway Co. v. Slattery*, said: "There the law was laid down by the Law Lords, to the effect that it is for the plaintiff, no doubt, to make out his case, and that if, in the course of making it out there is something showing that the fault was his own, then the Judge may be warranted in nonsuiting. But it was laid down also, and I remember a passage in Lord CAIRNS' judgment in which he laid it down in the strongest terms, that though if the plaintiff shows in the course of his own case that there was negligence in the person injured, he may be nonsuited, yet that if he does not show this, but simply shows a strong case of negligence in the defendants, he is not bound to go on and prove in the negative that there was no negligence on the part of the person killed or injured." This is not exactly what Lord CAIRNS said, according to the report in the Law Reports, but it is a proposition fairly deduced from his arguments there. The same view as to the burden of proof of contributory negligence is stated as the result of modern authority, by Mr. Justice MANISTY in *Holland v. North Metropolitan Tramway Co.* (1886), 3 Times Rep. 245.

In *Darey v. London and South Western Railway Co.* (1883), 11 Q. B. D. 213 (C. A. 1883), 12 Q. B. D. 70, 53 L. J. Q. B. 58, 49 L. T. 739, the plaintiff while crossing a railway by a public footpath on a level at a place where the view along the line in one direction was obstructed, was knocked down and injured by a train. The plaintiff stated that before crossing he had looked to the right; but admitted

that he had not looked to the left, and if he had would have seen the train coming. He was nonsuited; and the Queen's Bench Division held that the nonsuit was right. This judgment was affirmed in the Court of Appeal (by a majority, BRETT, M. R., and BOWEN, L. J., *diss.* BAGGALLAY, L. J.) on the ground that, though there was evidence of negligence on the part of the defendants, yet according to the undisputed facts of the case the plaintiff had shown that the disaster was caused solely by his omission to use the care which any reasonable person would have used. This decision was followed by the Exchequer Division in Ireland in *Coyle v. Great Northern Railway Co. of Ireland* (1887), 20 L. R. Ir. 409. The decision of the Irish Court of Appeal in *McDonnell v. Great Southern & Western Railway Co.* (1888), 24 L. R. Ir. 369, where the person killed was a servant of the company and knew that the train in question was due, was to enter judgment for the defendants on the ground that the evidence clearly showed that the deceased met his death by his own negligence.

AMERICAN NOTES.

1. *Burden of Proving Negligence.* — That the burden of proving some negligent act or omission on the part of the defendant rests upon the plaintiff, is well established in the United States. *Tourtellot v. Rosebrook*, 11 Metcalf (Mass.), 460 (1846); *Duffy v. Upton*, 113 Massachusetts, 544, 548; *Beaulieu v. Portland Co.*, 48 Maine, 291; *Wright v. New York, &c. Ry.*, 25 New York, 562; *Davis v. Detroit, &c. Ry.*, 20 Michigan, 105; *Central, &c. Ry. v. Kenney*, 58 Georgia, 485; 2 Thompson on Negligence, p. 1053, and cases cited.

A mere scintilla of evidence of negligence on the part of the defendant will not warrant a submission of the case to the jury; but in such case a verdict should be directed for the defendant, or the plaintiff nonsuited. *Shea v. Wellington*, 163 Massachusetts, 364; *Ross v. Pearson Cordage Co.*, 164 Massachusetts, 257; *Kendall v. Boston*, 118 Massachusetts, 234; *Laidlaw v. Sage* (New York), 52 N. E. Rep. 679 (1899); *Hudson v. Rome, &c. Ry.*, 145 New York, 408; *Losee v. Buchanan*, 51 New York, 476; *Nason v. West*, 78 Maine, 253; *Hall v. Brown*, 54 New Hampshire, 495; *Louisville, &c. Ry. v. Binion*, 98 Alabama, 570; *Allen v. Willard*, 57 Pennsylvania State, 374; *Grand Rapids, &c. Ry. v. Judson*, 34 Michigan, 506.

A scintilla of evidence within the meaning of this rule has been defined to be evidence so slight that the court would set aside any number of verdicts rendered upon it. "On the other hand, if the evidence is such that, though one or two verdicts rendered upon it would be set aside on motion, yet a second or third verdict would be suffered to stand, the cause should not be taken from the jury, but should be submitted to them under instructions." Per Mr. Justice CHAPMAN for the Court in *Denny v. Williams*, 5 Allen (Mass.), 1, 5. This was not said in a case of negligence, but has been approved in that class of cases in *Brooks v. Somerville*, 106 Massachusetts, 271, 275.

At the same time, it requires but little additional evidence on the part of

the plaintiff to turn the scale in his favor and to warrant a verdict for him, on the ground that the defendant was negligent.

In *Toy v. United States Cartridge Co.*, 159 Massachusetts, 313, the plaintiff, while in the defendant's employ, was injured by the breaking of a punch in a cartridge machine which she was operating. She testified that the second hand had put in a new punch, because she had complained of the old one as scratching; that the second time she used the new one it burst and caused her injuries; that, before she started the machine, she saw a small black mark that extended half way round the punch about in the middle of it; and that "she did not know what this black mark meant, but that it looked like a knitting-needle that had gone rusty and black." The foreman and the second hand testified that they saw nothing the matter with the punch. It was held that there was sufficient evidence of negligence to warrant a verdict for the plaintiff, and that the case should have been submitted to the jury. Other cases to the same effect are: *Moynihan v. Hills Co.*, 146 Massachusetts, 586; *Spicer v. South Boston Iron Co.*, 138 Massachusetts, 426; *Huggerty v. Hollowell Granite Co.*, Maine, 35 Atl. 1029.

Where an express statute imposes a specific duty upon the defendant, by reason of the non-performance of which duty the plaintiff suffers personal injuries, very slight evidence of its non-performance will warrant a finding in favor of the plaintiff. Thus, if a statute requires railroad companies to ring a bell or blow a whistle when their locomotives are approaching a highway crossing at grade, the testimony of a witness, who was near enough to hear the sound of the bell or whistle, that he heard no such sound, will warrant a finding that the bell was not rung nor the whistle blown. *Menard v. Boston & Maine Ry.*, 150 Massachusetts, 386; *Lee v. Chicago, &c. Ry.*, 80 Iowa, 172.

In cases of this nature, the action should not be withdrawn from the jury if the non-performance of the statutory duty was, though not an efficient cause of the plaintiff's injury, yet a cause which if it had not existed, the injury would not have happened. It is a question of fact for the jury to determine, unless the causal connection is evidently not proximate. *Hages v. Michigan Central Ry.*, 111 United States, 228, 241; *Borek v. Michigan Bolt Works*, 111 Michigan, 129; *Doyle v. Boston & Albany Ry.*, 145 Massachusetts, 386; *Norton v. Eastern Ry.*, 113 Massachusetts, 366; *Cayzer v. Taylor*, 10 Gray (Mass.), 274.

2. *Proximate Cause.* — The burden is also upon the plaintiff to prove that some negligent act or omission on the part of the defendant was the proximate and not the remote cause of the injury suffered by the plaintiff; and if he fails to sustain this burden of proof, the court should direct a nonsuit, or a verdict for the defendant. *Marble v. Worcester*, 4 Gray (Mass.), 395; *Forsyth v. Hooper*, 11 Allen (Mass.), 419; *Regan v. Donoran*, 159 Massachusetts, 1; *Burton v. West Jersey Ferry Co.*, 114 United States, 474; *Louisville, &c. Ry. v. Allen*, 78 Alabama, 494; *Louisville, &c. Ry. v. Binion*, 98 Alabama, 570.

In the recent and important case of *Laidlaw v. Sage*, decided by the Court of Appeals of New York on Jan. 10, 1899, reported in 52 Northeastern Reporter, 679, it appeared that one Norcross entered the private office of

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the defendant for the purpose of extorting money from him by means of a threat to kill him by a dynamite bomb which he carried. The plaintiff happened to be in the defendant's office at the same time on lawful business. The defendant did not comply with Norcross' request for money; Norcross dropped the dynamite bomb upon the floor: a terrific explosion followed, which wrecked the office, killed Norcross, and injured both plaintiff and defendant. The plaintiff testified that immediately before the explosion, the defendant took hold of the plaintiff and moved him about eighteen inches to the left, and held him between Norcross and the defendant, so as to shield the defendant, and protect the latter from the force of the explosion. The plaintiff was much more seriously injured than the defendant. At the trial by jury, the plaintiff obtained a verdict for a large amount, being represented by Hon. Joseph H. Choate, now Ambassador to England. The Court of Appeals, however, reversed the judgment of the lower Court, for the reason, among others, that the defendant's act was not the proximate cause of the plaintiff's injury, and held that a verdict should have been ordered for the defendant.

In *Milwaukee, &c. Ry. v. Kellogg*, 94 United States, 469 (1876), the plaintiff's mill and lumber were destroyed by fire, communicated from the defendant's steamboat to its grain elevator, and from the elevator to the plaintiff's sawmill and lumber piles. The elevator was built of pine lumber and was one hundred and twenty feet high, and was five hundred and thirty-eight feet distant from the plaintiff's mill, and three hundred and eighty-eight feet distant from the nearest lumber pile. An unusually strong wind was blowing from the elevator towards the mill and lumber. It was admitted that the fire was communicated from the defendant's steamboat to its elevator, by reason of defendant's negligence. The jury returned a verdict for the plaintiff, which the Supreme Court held was justified for the following reasons, as stated by Mr. Justice STRONG, beginning on page 474:

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market-place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held, that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. *These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible

nature of the saw-mill and the piles of lumber. Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequences of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building and constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

3. *Presumption of Negligence from Occurrence of Accident to Plaintiff.* — In actions by passengers and travellers and other non-employees of the defendant, the rule in America is that the mere occurrence of the accident to the plaintiff while lawfully upon or near the premises of the defendant, from a cause originating upon the defendant's premises, raises a presumption of negligence on the part of the defendant, and that in the absence of a defensive explanation, the judge should not direct a nonsuit or verdict for the defendant, but should submit the case to the jury with proper instructions. *Inland Coasting Co. v. Tolson*, 139 United States, 551; *Gleeson v. Virginia Midland Ry.*, 140 United States, 435; *Stokes v. Saltonstall*, 13 Peters (U. S.), 181; *White v. Boston & Albany Ry.*, 141 Massachusetts, 404; *Feital v. Middlesex Ry.*, 109 Massachusetts, 398; *Hicks v. New York, &c. Ry.*, 164 Massachusetts, 421; *Folkmar v. Manhattan Ry.*, 131 New York, 418; *Mullen v.*

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St. John, 57 New York, 567; *Howser v. Cumberland, &c. Ry.*, 80 Maryland, 146; *Cummings v. National Furnace Co.*, 60 Wisconsin, 603; *Iron Ry. v. Mowery*, 36 Ohio State, 418; *Illinois Central Ry. v. Phillips*, 55 Illinois, 194.

The following cases contain qualifications of the rule presuming negligence from the occurrence of the accident: *Kendall v. Boston*, 118 Massachusetts, 234; *Hutchinson v. Boston Gas Light Co.*, 122 Massachusetts, 219; *Walker v. Chicago, &c. Ry.*, 71 Iowa, 658; *Spencer v. Campbell*, 9 Watts & S. (Penn.) 32.

The rule which presumes negligence from the mere occurrence of the accident to the plaintiff does not, however, apply when the plaintiff is an employee of the defendant. In this case, the Judge should nonsuit the plaintiff, or order a verdict for the defendant, unless the plaintiff proves more than that he suffered personal injuries while lawfully at work for the defendant, or upon his premises. *Reynolds v. Merchants' Woolen Co.*, 168 Massachusetts, 501; *Reed v. Boston & Albany Ry.*, 164 Massachusetts, 129; *Duffy v. Upton*, 113 Massachusetts, 544; *Hudson v. Rome, &c. Ry.*, 145 New York, 408; *Nason v. West*, 78 Maine, 253; *Toledo, &c. Ry. v. Moore*, 77 Illinois, 217; *Louisville, &c. Ry. v. Allen*, 78 Alabama, 494; *Short v. New Orleans, &c. Ry.*, 69 Mississippi, 848.

In a few States, however, it has been decided that this presumption of negligence applies in actions by employees against employers, as well as to actions involving other relations. *Barnowsky v. Helson*, 89 Michigan, 523; *Mulcairns v. Janesville*, 67 Wisconsin, 24; *Tennessee Coal Co. v. Hayes*, 97 Alabama, 201.

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(C. P. 1837.)

RULE.

EVERY person in the conduct of his own affairs is bound to act with the care to be expected of a man of ordinary prudence; and if damage results to a neighbour from his failure so to act, he is liable as for an injury.

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3 Bing. N. C. 468-477 (s. c. 4 Scott, 244, 3 Hodges, 51, 1 Jur. 215 6 L. J. (N. S.) C. P. 92).

Negligence. — Ordinary Care.

[468]

An action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbour's house is burnt down.

And upon pleas of not guilty, and that there was no negligence, *held*, that it was properly left to the jury to say whether the defendant had been guilty of gross negligence, viewing his conduct with reference to the caution that a prudent man would have observed.

The declaration stated, that before and at the time of the grievance and injury, hereinafter mentioned, certain premises, to wit, two cottages with the appurtenances situate in the county of Salop, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff, to wit, one thereof in the possession and occupation of one Thomas Ruscoe as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff, and the other thereof in the possession and occupation of one Thomas Bickley as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff: that the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch, also near to the said cottages; and that the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, or put together, and then standing, and being in and upon the said close of the defendant. That on the 1st of August, 1835, while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, take fire, and break out into a flame, and there had appeared, and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into a flame; and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then

was and continued dangerous to the said cottages; of [* 469] which said several premises *the defendant then had

notice: yet the defendant well knowing the premises, but not regarding his duty in that behalf, on, &c., and from thence until and upon a certain day, to wit, on, &c., wrongfully, negligently, and improperly, kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages, although he could, and might, and ought to have removed and altered the same, so as to prevent the same from being and continuing so dangerous as aforesaid; and by reason thereof the said cottages for a long time, to wit, during all the time aforesaid, were in great danger of being consumed by fire. That by reason of the premises, and of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack, in a state

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or condition so dangerous as aforesaid, and so liable and likely to ignite and take fire and break out into flame, on, &c., and while the said cottages so were occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff, the said rick or stack of hay of the defendant, standing in the close of the defendant, and near the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant so being of wood and thatch as aforesaid, and so being near to the said rick or stack as aforesaid, were set on fire; and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame so occasioned as aforesaid by the igniting and breaking out into flame, of the said rick or stack, was thereupon then communicated unto the said cottages in which the plaintiff was interested as aforesaid, which were thereby then respectively set on fire, and then, to wit, on, &c., by reason of such

* carelessness, negligence, and improper conduct of the [* 470] defendant in so continuing the said rick or stack in such a dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being of great value, to wit, the value of £500. And by means of the premises, the plaintiff was greatly and permanently injured in his said reversionary estate and interest of and in each of them: to the plaintiff's damage of £500.

The defendant pleaded, first, not guilty. Secondly, that the said rick or stack of hay was not likely to ignite, take fire, and break out into flame; nor was the same by reason of such liability, and of the state or condition of the said rick and stack of hay, dangerous to the said cottages; nor had the defendant notice of the said premises, in manner and form as the plaintiff had in and by his declaration in that behalf alleged. Thirdly, that the defendant did not, well knowing the premises in the declaration in that behalf mentioned, wrongfully, negligently, or improperly, keep or continue the said rick or stack of hay, in a state and condition dangerous to the said cottages. Fourthly, that the said rick or stack of hay, did not by reason of the carelessness, negligence, and improper conduct of the defendant in that behalf, ignite, take fire, and break out into flame. And fifthly, that the said cottages were not consumed, damaged, and destroyed by rea-

son of the carelessness, negligence, and improper conduct of the defendant.

At the trial, it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire: that though there were conflicting opinions on the subject, yet during a period of five [* 471] weeks, the defendant was repeatedly warned of his * peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said "he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

PATTESON, J., before whom the cause was tried, told the jury that the question for them to consider was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule *nisi* for a new trial was obtained, on the ground that the jury should have been directed to consider, not, whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted *bonâ fide* to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances, was of the first impression.

Talfourd, Serjt., and Whately, showed cause.

The pleas having expressly raised issues on the negligence of the defendant, the learned Judge could not do otherwise than leave that question to the jury. The declaration alleges that the defendant knew of the dangerous state of the rick, and yet negligently and improperly allowed it to stand. The plea of not guilty, therefore, puts in issue the *scienter*, it being of the [* 472] substance * of the issue. *Thomas v. Morgan*, 2 Cr. M. & R. 496. And the action, though new in specie, is founded on a principle fully established, that a man must so use

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his own property as not to injure that of others. On the same circuit, a defendant was sued a few years ago, for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbours' wood. The plaintiff recovered damages, and no motion was made to set aside the verdict. Then, there were no means of estimating the defendant's negligence, except by taking as a standard, the conduct of a man of ordinary prudence: that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R. V. Richards, in support of the rule.

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence; the defendant had a right to place his stack as near to the extremity of his own land as he pleased: *Wyatt v. Harrison*, 3 B. & Ad. 871 (37 R. R. 566): under that right, and subject to no contract, he can only be called on to act *bonâ fide* to the best of his judgment: if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. In *Crook v. Jadis*, 5 B. & Ad. 910, PATTESON, J., says, "I never could understand * what is meant by parties taking [* 473] a bill under circumstances which ought to have excited the suspicion of a prudent man:" and TAUNTON, J., "I cannot estimate the degree of care which a prudent man should take."

In *Foster v. Pearson*, 1 C. M. & R. 855, too, it appears that the rule which called on persons taking negotiable instruments to act with the circumspection of a prudent man, has at length been abandoned. There, the Judge left it to the jury to say whether the holder of bills took them with due care and caution and in the ordinary course of business; and upon a motion to set aside a verdict for the plaintiff, the Court said: "Of the mode in which the question was left, the defendant has certainly no right to complain; but, if the verdict had been in his favour, it would have become necessary to consider whether the learned Judge was correct in adopting the rule first laid down by the Court of Common Pleas, in

the case of *Snow v. Peacock*, 3 Bing. 406, and which was founded upon the *dicta*, rather than the decision, of the Judges of the King's Bench in the case of *Gill v. Cubitt*, 3 B. & C. 466, 5 D. & R. 324; more especially since the opinion of the latter Court has been so strongly intimated in the late cases of *Crook v. Jadis*, 5 B. & Ad. 910, 3 N. & M. 257, and *Backhouse v. Harrison*, 5 B. & Ad. 1098, 3 N. & M. 188. The rule of law was long considered as being firmly established, that the holder of bills of exchange indorsed in blank or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a *bonâ fide* holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been treated as essential to the validity of his title, besides, and independently of, honesty of purpose.*

[* 474] *TINDAL, C. J. — I agree that this is a case *primæ impressionis*; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect; and though the defendant did not himself light the fire, yet mediately, he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee. *Turbervill v. Stamp*, 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but, when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbour, can any one doubt that an action on the case would lie?

It is contended, however, that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the

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question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and *bonâ fide* to the best of his own judgment. That, * however, would leave so vague a line [* 475] as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs v. Bernard*, 2 Ld. Raym. 909. Though in some cases a greater degree of care is exacted than in others, yet in “the second sort of bailment, viz. *commodatum* or lending *gratis*, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month; if the bailee put this horse in his stable, and he was stolen from thence, the bailee shall not be answerable for him: but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.” The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. * That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

PARK, J. — I entirely concur in what has fallen from his Lordship. Although the facts in this case are new in specie, they fall

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within a principle long established, that a man must so use his own property as not to injure that of others. In *Turbervill v. Stamp*, 1 Salk. 13, which was “an action on the case upon the custom of the realm, *quare negligenter custodivit ignem suum in clauso suo, ita quod per flammam blada Quer. in quodam clauso ipsius Quer. combusta fuerunt*; after verdict *pro Quer.* it was objected that the custom extended only to fire in his house, or curtilage (like goods of guests) which were in his power: *Non alloc.* For the fire in his field was his fire as well as that in his house; he made it, and must see that it did no harm, and must answer the damage if he did. Every man must use his own so as not to hurt another: but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shown it. And HOLT, and ROKESBY, and EYRE were against the opinion of TURTON, who went upon the difference between fire in a house which was in a man's custody and power, and fire in a field which was not properly so; and that it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three.” That case, in its principles, applies closely to the present.

As to the direction of the learned Judge, it was perfectly correct. Under the circumstances of the case, it was proper to leave it to the jury whether with reference to the caution which [* 477] would have been observed by *a man of ordinary prudence, the defendant had not been guilty of gross negligence. After he had been warned repeatedly during five weeks as to the consequences likely to happen, there is no colour for altering the verdict, unless it were to increase the damages.

GASELEE, J., concurred in discharging the rule.

VAUGHAN, J. — The principle on which this action proceeds, is by no means new. It has been urged that the defendant in such a case takes no duty on himself; but I do not agree in that position: every one takes upon himself the duty of so dealing with his own property as not to injure the property of others. It was, if any thing, too favourable to the defendant to leave it to the jury whether he had been guilty of gross negligence; for when the defendant upon being warned as to the consequences likely to ensue from the condition of the rick, said, “he would chance it.”

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it was manifest he adverted to his interest in the insurance office. The conduct of a prudent man has always been the criterion for the jury in such cases: but it is by no means confined to them. In insurance cases, where a captain has sold his vessel after damage too extensive for repairs, the question has always been, whether he has pursued the course which a prudent man would have pursued under the same circumstances. Here, there was not a single witness whose testimony did not go to establish gross negligence in the defendant. He had repeated warnings of what was likely to occur, and the whole calamity was occasioned by his procrastination.

Rule discharged.

ENGLISH NOTES.

The principle of the above case is almost identical with the class of cases arising out of occupation more particularly dealt with under Nos. 9 & 10. *post.* Another case similar in principle but not depending upon the occupation of a tenement, is *Whiteley v. Pepper* (1877), 2 Q. B. D. 276, 46 L. J. Q. B. 436, 36 L. T. 588, 25 W. R. 607. There the defendant was a coal merchant; and a carter employed by the defendant in delivering coals at a house having a cellar below the foot pavement of the street, had removed the iron plate of the coal shoot, and left the place open without giving warning to the plaintiff who was passing along the pavement, and who, without negligence, stepped into the hole and was hurt. The defendant was held liable. If the occupier of the house and cellar could have been also held liable, as in the case of *Pickard v. Smith* (1861), 10 C. B. (N. S.) 470, 4 L. T. 470, that did not exonerate the coal merchant, who was responsible for the act of his servant in the course of his employment.

The same principle has been applied to statutory bodies (or other persons) executing works under permissive statutory powers. In executing such works, a duty of care is exacted; and if a person in the exercise of his lawful rights is injured by want of such care the author of the work is liable, although the negligence may be that of a contractor for the work who is also liable. Thus, in *Gray v. Pullen* (1864), 5 B. & S. 970, 34 L. J. Q. B. 265, 11 L. T. 569, 13 W. R. 257, the Court in the Exchequer Chamber (reversing the decision of the Queen's Bench), held the owner of a house who was making a drain, under the powers of the Metropolis Local Management Act, 1856, liable for the negligence of a contractor employed by him in the work.

In *Hardaker v. Idle District Council* (C. A.), 1896, 1 Q. B. 335, 65 L. J. Q. B. 363, 74 L. T. 69, 44 W. R. 323, a district council being about to construct a sewer under their statutory powers, employed a

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contractor to do the work. By the contractor's negligence in carrying out the work, a gas-main was broken, and the gas escaped into the house where the plaintiffs (a husband and wife) resided. An explosion took place by which the wife was hurt and the husband's furniture damaged. The Court of Appeal, reversing the judgment of WRIGHT, J. (who held that the district council were not liable for the negligence of their contractor), held that the district council (as well as the contractor whose liability had been established) was liable, and that judgment should be entered against them accordingly.

Another example is supplied by the case of *Penny v. Wimbledon Urban Council* (1898), 2 Q. B. 212, 67 L. J. Q. B. 754. The council, acting under the Public Health Act, 1875 (sect. 150), took upon themselves the work of making good a highway which was used by the public, but had not become repairable by the inhabitants at large. They employed a contractor to do the work, under the directions of their surveyor; and in the course of the work, the contractor negligently left on the road a heap of soil and grass, unlighted and unprotected. A person walking on the road after dark fell over the heap, and brought an action against the district council and the contractor, for injury sustained. The council and the contractor delivered separate defences. The contractor paid £75 into Court. The district council denied liability, and also pleaded that the sum paid into Court by the contractor was sufficient. The action was tried, and the jury awarded £50 damages. On motion by the plaintiff to have judgment entered against the district council, it was held by BRUCE, J., that the district council was liable; that they were not exonerated by reason of the contractor having paid the money into Court; and that judgment must be entered against them accordingly. But as the £50 awarded by the verdict had been obtained by the plaintiff from the contractor, the judgment would be entered for the costs only.

There are early cases from which it appears that the liability of the owner of property with regard to the safe-keeping of fire which he makes on his land is of the kind established in *Fletcher v. Rylands* (1 R. C. p. 236). The case of *Turbervill v. Stamp*, 1 Ld. Raym. 264, is a typical instance. The law there laid down by HOLT, Ch. J., and the rest of the Court (TURTON, J., dissenting) was this: "Every man must so use his own as not to injure another. The law is general; the fire which a man makes in his fields is as much his fire as his fire in his house; it is made on his grounds, with his materials, and by his order, and he must at his peril take care that it does not through his neglect injure his neighbour. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground and prejudice him, this is fit to be given in evidence." Soon after this case

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the statute 6 Anne, c. 3, was passed which enacted (sect. 6) that "no action, suit, or process whatsoever should be had, maintained, or prosecuted against any person in whose house or chamber any fire should accidentally begin, nor any recompense be made by such person for any damage suffered or occasioned thereby, any law, usage or custom to the contrary notwithstanding." This clause was re-enacted by the 14 Geo. III., c. 78, s. 86, adding the word "estate" to "house or chambers." It is to be observed that the defence of "accident" was open even under the ruling of HOLT, Ch. J. But after the statutes, probably some affirmative proof of negligence is required; such as was proved in the principal case. The liability as to spreading of fire through negligence is further illustrated by the case of *Smith v. London and South Western Railway Co.*, No. 8, p. 726, *post*.

AMERICAN NOTES.

Shibley v. Fifty Associates, 106 Massachusetts, 194 (1870), is a leading case upon this subject in the United States. The defendants were the owners of a building, four stories high, fronting on Union Street, a highway in the City of Boston. The plaintiff, while walking along Union Street upon the sidewalk near the defendants' building, was hit and injured by snow and ice falling from the roof of defendants' building. The roof was not of unusual construction, but was so constructed that snow and ice collecting upon it would naturally and probably slide off upon Union Street. It was held that the case depended upon the same principles as if it were between adjoining proprietors; that the defendants were bound at their peril to keep the snow and ice within their own premises; that it was no defence to show that reasonable care and diligence had been used in the management of the roof, as the damage was caused by maintaining a roof of such shape in such close proximity to a highway, and that the defendants were guilty of negligence for which the plaintiff could recover. In this case the roof was in the control of the defendants. If, however, the roof is in the control of a lessee of the building, the owner is not liable. *Leonard v. Storer*, 115 Massachusetts, 86. The principle that a person who keeps anything upon his land which will damage others if it escapes, must keep it upon his premises at his peril, has also been applied to cesspools in *Ball v. Nye*, 99 Massachusetts, 582; to artificial reservoirs of water in *Gray v. Harris*, 107 Massachusetts, 492; to party walls in *Gorham v. Gross*, 125 Massachusetts, 232. See also *Garland v. Towne*, 55 New Hampshire, 55 (1874); *Pirley v. Clark*, 35 New York, 520 (1866); *Bryant v. Bigelow Carpet Co.*, 131 Massachusetts, 491 (1881); *Smith v. Faxon*, 156 Massachusetts, 589 (1892); *Bates v. Westborough*, 151 Massachusetts, 174.

The fact that the escape of the dangerous thing from the defendant's premises is not due to the personal negligence of the defendant, but to the negligence of an independent contractor, constitutes no defence, at least where the damage occurs after the work of the independent contractor has

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been completed and accepted by the defendant. *Gorham v. Gross*, 125 Massachusetts, 232; *Hilliard v. Richardson*, 3 Gray (Mass.), 349, 353; *Chicago v. Robbins*, 2 Black (U. S.), 418, 428; *Boswell v. Laird*, 8 California, 469, 498. See, however, of a contrary tendency, *Carter v. Berlin Mills*, 58 New Hampshire, 52 (1876).

But where the escape of the dangerous substance from the defendant's premises is due to the plaintiff's own fault, or of *vis major*, the act of God, or the acts of third parties which the defendant had no reason to anticipate, no liability exists. *Mahoney v. Libbey*, 123 Massachusetts, 20; *Gorham v. Gross*, 125 Massachusetts, 232, 238; *Doupe v. Genin*, 45 New York, 119; *Marshall v. Cohen*, 44 Georgia, 489; *Carter v. Berlin Mills*, 58 New Hampshire, 52.

The fact that an extraordinary storm contributed to the escape of the dangerous substance from the defendant's premises does not, however, exonerate the defendant from liability. *Smith v. Faxon*, 156 Massachusetts, 589; *Woodward v. Aborn*, 35 Maine, 271; *Scott v. Hunter*, 46 Pennsylvania State, 192; *Polack v. Pioche*, 35 California, 416, 423; *Barnard v. Poor*, 21 Pickering (Mass.), 378.

No. 8. — SMITH v. LONDON AND SOUTH WESTERN RAILWAY CO.

(EX. CH. 1870.)

RULE.

WHERE liability for negligence is established, the circumstance that the amount of damage was enhanced by inevitable accident is no defence against a claim for the whole damage.

Smith v. London and South Western Railway Company.

L. R. 6 C. P. 14-23 (s. c. 40 L. J. C. P. 21, 23 L. T. 678, 19 W. R. 230).

[14] *Railway Company. — Negligence. — Fire from Engine. — Remoteness of Damage.*

Workmen employed by the defendants, a railroad company, after cutting the grass and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there fourteen days during very hot weather, which had continued for some weeks. A fire broke out between the hedge and the rails, and burnt some of the heaps of trimmings and the hedge, and spread to a stubble-field beyond, and was thence carried by a high wind across the stubble-field and over a road, and burnt the plaintiff's cottage, which was situated about two hundred yards from the place

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where the fire broke out. There was evidence that an engine belonging to the defendants had passed the spot shortly before the fire was first seen, but no evidence that the engine had emitted any sparks, nor any further evidence that the fire had originated from the engine, nor was there any evidence that the fire began in the heaps of trimmings and not on the parched ground around them: —

Held, first, that it being a matter of common knowledge that engines do emit sparks, there was evidence for the jury that the fire originated in sparks from the engine that had just passed.

Secondly, that there was evidence for the jury that the defendants were negligent in leaving the dry trimmings, and that the trimmings either originated or increased the fire, and caused it to spread to the stubble-field.

Thirdly, that if the defendants were negligent, they were responsible for the injury that resulted from their conduct to the plaintiff, although they could not have reasonably anticipated that such injury would be caused by it.

Appeal from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a nonsuit (L. R. 5 C. P. 98).

This was an action for negligence, and the declaration contained three counts, of which the second and only material one was as follows: —

“That at the time of the committing by the defendants of the grievances in this count mentioned, the plaintiff was possessed of a cottage and premises, and the defendants were possessed of and had the care and management of a railway running near the said cottage and premises, with banks belonging thereto, and part of the said railway, and were possessed of locomotive engines containing burning substances, which were used by the defendants for conveying *carriages along this railway. Yet, by [*15] the negligence and improper conduct of the defendants, and the want of due care on the part of the defendants in the keeping and management of their said railway engines and banks, quantities of cut grass and hedge trimmings were heaped up on the said railway and banks, and became and were ignited, and a fire was occasioned which spread over and along a stubble field, near the said railway, unto the said cottage and premises, and set fire to the same, and thereby the same and the plaintiff’s furniture, &c., then being in and near the said cottage and premises, were burnt and destroyed, and the plaintiff lost the use and enjoyment of the same.”

The defendants pleaded not guilty, and issue was joined thereon.

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The case was tried before KEATING, J., at the summer assizes, 1869, held at Dorchester, when evidence was given for the plaintiff which was in substance as follows:—

It was proved that the defendants' railway passed near the plaintiff's cottage, and that a small strip of grass extended for a few feet on each side of the line, and was bounded by a hedge which formed the boundary of the defendants' land; beyond the hedge was a stubble-field, bounded on one side by a road beyond which was the plaintiff's cottage. About a fortnight before the fire the defendants' servants had trimmed the hedge and cut the grass, and left the trimmings and cut grass along the strip of grass. On the morning of the fire the company's servants had raked the trimmings and cut grass into small heaps. The summer had been exceedingly dry, and there had been many fires about in consequence. On the day in question, shortly after two trains had passed the spot, a fire was discovered upon the strip of grass land forming part of the defendants' property; the fire spread to the hedge and burnt through it, and caught the stubble-field, and, a strong wind blowing at the time, the flames ran across the field for 200 yards, crossed the road, and set fire to and burnt the plaintiff's cottage. There was no evidence that the defendants' engines were improperly constructed or worked; there was no evidence, except the fact that the engines had recently passed, to show that the fire originated from them. There was no evidence

whether the fire originated in one of the heaps of trim-
[* 16] mings or on some other part * of the grass by the side of the line; but it was proved that several of the heaps were burnt by the fire. Two of the company's servants were proved to have been close to the spot when the fire broke out, and to have given the alarm, but they were not called by either side.

At the close of the plaintiff's case the counsel for the defendants submitted that there was no case to go to the jury. At the suggestion of the Judge, and by consent, a verdict was taken for the plaintiff for £30, subject to leave reserved to the defendants to move to set it aside, and instead thereof to enter a verdict for them, on the ground that there was no evidence to go to the jury of any liability on the part of the defendants. The Court to be at liberty to draw inferences and to amend the pleadings.

The defendants applied for and obtained a rule pursuant to the leave reserved, which, after argument, was discharged (L. R. 5 C.

P. 98) and from the judgment so given discharging the rule the present appeal was brought.

Kingdon, Q. C. (Murch with him), for the defendants. There is no evidence that the trimmings were the cause of the fire. It was proved that they were partially consumed by it, but not that it originated in them. Nor was there any evidence that the fire was caused by sparks coming from the engine. There were many other ways in which it may have begun which are equally consistent with the evidence. Thus, a fusee may have been thrown from a window of one of the carriages of the train, or one of their workmen on the line may have dropped a spark from his pipe. Where the evidence is equally consistent with the view that the defendants were liable, and that they were not, there is no evidence to go to the jury.

[CHANNELL, B. — But here the two causes of the fire that are suggested, viz., the engine and the pipe or cigar, are not of equal probability, and there was evidence for the jury, therefore, that the fire was caused by the more probable of the two alleged causes.]

The company would not be responsible for the sparks unless they acted negligently. The spark may have set fire to the dry grass, and then spread to the trimmings; and if the banks were *properly kept, the fire would not, in that view, have [*17] been caused by the defendants' negligence, nor would the defendants be responsible.

[BLACKBURN, J. — I understand KEATING, J., to say that the trimmings increased the fierceness of the fire, if they did not originate it, and so made it spread.]

There is nothing in the evidence to show what was the character of the fire before it got into the stubble-field.

[KELLY, C. B. — Surely it would be for the jury to say whether it was more probable that the trimmings or the grass first ignited?]

Even if there be evidence that the heaps of trimmings contributed to the fire, there is no evidence that they contributed to the final result. The defendants are not answerable for any exceptional state of circumstances which they could not reasonably expect. In *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781, 785, 25 L. J. Ex. 212, 214 (p. 621, *ante*), BRAMWELL, B., said: "It would be monstrous to hold the company liable for negligence because they did not foresee an event that was so remote from prob-

ability that for many months it could not be found out what was the cause of the injury to the plaintiff's premises." The same was held in *Coramman v. Eastern Counties Railway Company*, 4 H. & N. 781, 29 L. J. Ex. 94. Here it was impossible that the defendants could foresee that the fire would spread so far and across a public highway to the plaintiff's premises, and they cannot, therefore, be liable. This was the view taken by BRETT, J., in the Court below.

[BLACKBURN, J. — In *Fletcher v. Rylands*, L. R. 3 H. L. 330, the House of Lords held that the defendants were responsible for the injury caused, though no one could have reasonably anticipated it.]

Cole, Q. C. (Bere, Q. C., with him), for the plaintiff. The season when this fire occurred had been a very dry one, and it was the duty of the defendants to take special care of their banks. Probably for that reason they did send men to cut the rummage, as it was called, and trim the hedges; but, instead of taking it away, they left the litter all along the line for a fortnight to get dryer, and on the day in question it had been raked together in small heaps. It was clearly negligent, under the circumstances, to leave such inflammable matter lying all along the line. The second [* 18] * count in *Vaughan v. Taff Vale Railway Co.*, 3 H. & N.

743, 28 L. J. Ex. 41, in error 5 H. & N. 679, 29 L. J. Ex. 247, was very similar to that in this action, and was, in effect, upheld by the Exchequer Chamber, who ordered a new trial on the ground that it had never been properly left to the jury; and in *Freemantle v. London and North Western Railway Co.*, 10 C. B. (N. S.), at p. 96, 31 L. J. C. P. 12, WILLES, J., said: "In *Vaughan v. Taff Vale Railway Co.* (5 H. & N. 679, 29 L. J. Ex. 247, the parties afterwards came before me at chambers, and I made an order by consent, staying the proceedings on payment of the damages and costs. The company in that case had allowed the embankment of their railway to be in such a state as to become peculiarly liable to ignite from anything that might fall from an engine." Even if the trimmings were not the origin of the fire, it would have spread but slowly without them, and would have been put out by the company's servants, who were proved to be at hand. In *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781, 25 L. J. Ex. 212 (p. 621. *ante*), the defendants had done all that they were bound to do by their Act of Parliament, and the accident was caused

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by ice getting under the plugs, which, as BRAMWELL, B., said, it was no more their duty than that of the plaintiff to remove. The judgment of BRETT, J., in the Court below, is to a great extent in favour of the plaintiff. He admits that if the cottage had been near the railway, the defendants would have been liable; but, if so, it must at least have been a question for the jury whether the circumstances were such that the defendants could not have reasonably expected this injury to have occurred. If a man lights a fire on his own land, and it extends to that of another, and does injury, he is responsible for it; *Vaughan v. Menlove*, 3 Bing. N. C. 468 (p. 715, *ante*), that was also laid down in *Turbervill v. Stamp*, 1 Salk. 13; and though it is there said he will not be responsible if the fire is carried to the property of another by a sudden storm, that refers to a storm of a wholly exceptional, unexpected character, and not to a high wind only. See *Jones v. Festiniog Railway Co.*, L. R. 3 Q. B. 733, 735.

Kingdon, Q. C., in reply. The case that has gone farthest in favour of the plaintiff on the question of remoteness of damage is * *Vaughan v. Menlove*, 3 Bing. N. C. 468 (p. 715, [* 19] *ante*), and there the land was that of a neighbour, and the case is explained by BRAMWELL, B., in *Blyth v. Birmingham Waterworks Company*, 11 Ex. 781, 784, 25 L. J. Ex. 212 (p. 621, *ante*), who says that the defendant in that case had been expressly warned of the danger that his conduct was causing. The doctrine of the remoteness of damage is founded on common sense. There must be a limit placed somewhere to persons' liability.

KELLY, C. B. — I certainly entertained some doubts during the argument as to whether the judgment of the Court below could be sustained; but when I consider the facts, I cannot but feel that it is a case in which there was some evidence of negligence on the part of the defendants, and negligence which caused the injury complained of. It appears that about the time that the spot in question was passed by an engine which, as we know, would emit sparks which would fall on the adjoining ground, a fire was discovered on the defendants' ground adjoining the line. It appears that it had been a dry summer, and the hot weather had continued for many weeks before the occurrence; and probably with a view to prevent mischief, the defendants had caused the grass that grew by the line and the fence to be cut, and the cuttings of the grass

and hedge were placed in small heaps on the ground between the rails and the hedge. On the other side of the hedge was a stubble-field of considerable extent which would be extremely dry, and at a distance of two hundred yards across a road was the cottage belonging to the plaintiff. This was the state of facts. The trimmings caught fire; there was a strong southeast wind blowing; and though we have no proof of the exact progress of the fire, because the company's servants who had seen it were not called, it appears to have extended to and through the hedge and across the field to the plaintiff's cottage which was burnt. The question for us is, how all this occurred. There is some doubt how the fire originated; but there was ample evidence for the jury, which would have been rightly left to them, that it originated from sparks from the engine falling on the dry heaps of trimmings, and thence extending to the hedge and stubble-field. If that was so, the question arises whether there was any negligence in the [* 20] defendants. *Now it can scarcely be doubted that the defendants were bound in such a summer, knowing that trains were passings from which sparks might fall upon them, to remove these heaps of trimmings; and, at any rate, it was a question for the jury whether it was not negligent of them not to do so. I think, therefore, there was a case for the jury on which they might reasonably have found that the defendants were negligent in not removing the trimmings as soon as possible, and that this was the cause of the injury. Then comes the question raised by BRETT, J., to which at first I was inclined to give some weight. He puts it thus: "I quite agree that the defendants ought to have anticipated that sparks might be emitted from their engines, notwithstanding that they were of the best construction, and were worked without negligence, and that they might reasonably have anticipated that the rummage and hedge trimmings allowed to accumulate might be thereby set on fire. But I am of opinion that no reasonable man would have foreseen that the fire would consume the hedge and pass across a stubble-field, and so get to the plaintiff's cottage at a distance of 200 yards from the railway, crossing a road in its passage." It is because I thought, and still think, the proposition is true, that any reasonable man might well have failed to anticipate such a concurrence of circumstances as is here described that I felt pressed at first by this view of the question; but on consideration I do not feel that that is a true test of the liability of the

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defendants in this case. It may be that they did not anticipate, and were not bound to anticipate that the plaintiff's cottage would be burnt as a result of their negligence; but I think the law is, that if they were aware that these heaps were lying by the side of the rails, and that it was a hot season, and that therefore by being left there the heaps were likely to catch fire, the defendants were bound to provide against all circumstances which might result from this, and were responsible for all the natural consequences of it. I think, then, there was negligence in the defendants in not removing these trimmings, and that they thus became responsible for all the consequences of their conduct, and that the mere fact of the distance of this cottage from the point where the fire broke out does not affect their liability, and that the judgment of the Court below must be affirmed.

* MARTIN, B. — I am of the same opinion. The only ques- [* 21]
tion we have to decide is, whether there was any evidence for the jury of negligence on the part of defendants which caused the injury complained of. The facts are, that the plaintiff had a cottage near the railway, and that he was perfectly innocent of anything that could conduce to his loss, and that he had his house burned down. The question is, Did the fire come there from any negligent act of the defendants? I think there is evidence that it did. There was evidence of the trimmings being improperly left by the defendants by the side of their line, and that a spark from a passing engine fell on them and caused the fire, which was thus due to the defendants' negligence.

BRAMWELL, B., concurred.

CHANNELL, B. — I am of the same opinion. I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by BRAMWELL, B., in his judgment in *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 25 L. J. Ex. 212 (p. 621, *ante*), referred to by Mr. Kingdon, but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.

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BLACKBURN, J. — I also agree that what the defendants might reasonably anticipate is, as my Brother CHANNELL has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence. I have still some doubts whether there was any evidence that they were negligent, but as all the other Judges are of opinion that there was evidence that they were, I am quite content that the judgment of the Court below should be affirmed. I do not dissent, but I have some doubt, and will state from what my doubt arises. I take it that, since the case of *Vaughan v. Taff Vale Railway Co.*, 5 H. & N. 679, 29 L. J. Ex. 247, which was expressly affirmed in *Brand v. Hammersmith Railway Co.*, [* 22] L. R. 4, H. L. 171, it is clear that when a railway * company is authorised by their Act of Parliament to run engines on their line, and that cannot be done without their emitting sparks, the company are not responsible for injuries arising therefrom, unless there is some evidence of negligence on their part. That being so, I agree that if they have the land at the edge of the line in their own occupation, they ought to take all reasonable care that nothing is suffered to remain there which would increase the danger. Then comes the question, Is there evidence enough in this case of a want of that reasonable care? It can hardly be negligent not to provide against that which no one would anticipate. I have no doubt that if the company strewed anything very inflammable, such as, to put an extreme case, petroleum, along the side of their line, they would be guilty of negligence. The reasoning for the plaintiff is that the dry trimmings were of an inflammable character and likely to catch fire. My doubt is, whether, since the trimmings were on the verge of the railway on the company's land, if the quickset hedge had been in its ordinary state, they might not have burned only on the company's premises, and done no further harm, and whether the injury, therefore, was not really caused by the hedge being dry, so that it caught fire, and by the fire thus spreading into the stubble-field, and thence to the plaintiff's cottage. I think it is clear that when the company were planning the railway they could not expect that the hedge would become so dry, and therefore were not negligent in putting a hedge instead of a stone wall, and though the drought had lasted some weeks, I can hardly think it was negligent in them not to remove the hedge. I do not say

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that there is not much in what is said with respect to the trimmings being the cause of the injury, and not the state of the hedge, but I doubt on this point, and, therefore, doubt if there was evidence of negligence; if the negligence were once established, it would be no answer that it did much more damage than was expected. If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits some one, he is guilty of negligence, and liable for the injury he has caused; but if he fires in his own road, where he cannot reasonably anticipate that any one will be, he is not liable to any one whom he shoots, which shows that what a person may reasonably anticipate is important in considering whether he has been negligent; but if a person * fires across a road when it is dangerous to [* 23] do so, and kills a man who is in the receipt of a large income, he will be liable for the whole damage, however great, that may have resulted to his family, and cannot set up that he could not have reasonably expected to have injured any one but a labourer.

PIGOTT, B. — I am of the same opinion. I had some doubts at first, but in the result I am of the same opinion as is expressed by KEATING, J., in his judgment in the Court below. He says that he was pressed with the consideration that leaving some very inflammable substance along the side of the line where trains were frequently passing was some evidence of negligence. It comes to this, that in a dry summer, with a knowledge of the risk of fire which must be caused, the defendants left heaps of combustible matter along the side of their line; then whether the fire did arise from those heaps was a question for the jury, and it seems clear that it either came from, or was at any rate increased by, the heaps, and so got through the fence to the field, and when once in the field there was no way to stop it till it burned the plaintiff's cottage, and this, as it seems to me, was nothing but what a reasonable man might have anticipated.

LUSH, J. — I am also of opinion that there was evidence from which a jury might properly conclude that the fire originated from the sparks falling from the engine, and that the heaps added to its intensity, and thus caused it to burn the hedge and stubble; and I confess it seems to me that the more likely the hedge was

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to take fire, the more incumbent it was upon the company to take care that no inflammable material remained near to it.

Judgment affirmed.

ENGLISH NOTES.

The rule is closely allied to the topics discussed under Nos. 2 & 7 of "Accident," 1 R. C. 210-216, 276-296; and the questions as to proximate and remote cause of damage, which are very fully dealt with under No. 6 of "Damages," 8 R. C. 405-419. The principal case has been already cited as an illustration of the rule under No. 2 of "Accident," 1 R. C. 210, 214; and it may be fairly regarded as marking a distinguishing line between the cases falling under the rule No. 8 of "Accident," 1 R. C. 296. and those under No. 7 of this title (p. 715, *et seq., ante*). The railway company were not responsible for the unavoidable emission of sparks; but they were responsible for unnecessarily leaving a heap of combustibles exposed to those sparks.

AMERICAN NOTES.

The American cases relating to this rule are cited in No. 2 of "Accident," 1 Ruling Cases, 210, 215.

In *Salisbury v. Herchenroder*, 106 Massachusetts, 458 (1871), the plaintiff's window was broken by a falling sign, belonging to the defendant, which he had hung over the sidewalk, in violation of a city ordinance. The sign was hung with due care as to its construction and fastenings, and was blown down by the wind during an extraordinary gale. It was held that the defendant was liable, although the sign would not have fallen but for the gale, because his illegal act in hanging the sign over the sidewalk contributed to the plaintiff's injury.

In *Smith v. Faxon*, 156 Massachusetts, 589 (1892), the same principle was applied to a case where an extraordinary storm greatly enhanced the damage to the plaintiff, and the defendant's negligent act was not in violation of a statute or ordinance.

In *Nelson v. Godfrey*, 12 Illinois, 20 (1850), the plaintiff's goods in the cellar of his warehouse were injured by water, which flowed through the street gutter into defendant's cellar, by reason of defendant's negligence in excavating a coal cellar in the sidewalk in front of his premises, and thence through several other cellars to the plaintiff's cellar. The Supreme Court of Illinois decided that the defendant was liable, although there was an unusually heavy rain-storm the night of the injury, which filled the gutters with large quantities of rain-water, and forced in the curbstone, and prostrated the wall, which had been partially erected under and back of it. See also *Milwaukee, &c. Ry. v. Kellogg*, 94 United States, 469, and other cases cited in the American Notes to Nos. 4-6, of "Negligence," page 713, *ante*.

NOTES

ON

ENGLISH RULING CASES

CASES IN 18 E. R. C.

18 E. R. C. 1, *KING v. KING*, 3 P. Wms. 358.

Nature and elements of mortgage.

Cited in *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394, on rules for determination of whether an instrument constitutes a conditional sale or a mortgage.

Cited in note in 18 E. R. C. 363, on right of redemption as inseparable attribute of a mortgage.

—Debt secured and covenant to pay.

Cited in *Johnson v. Hines*, 61 Md. 122, on a mortgage as an evidence of an indebtedness; *Hall v. Morley*, 8 U. C. Q. B. 584, on a mortgage as implying a loan in equity; *Galt v. Jackson*, 9 Ga. 151, holding a sale of property with an obligation to reconvey upon certain terms, where the relationship of creditor and debtor is not created, does not constitute a mortgage; *Morris v. Budlong*, 78 N. Y. 543, holding where an absolute deed is claimed to be a mortgage, proof of an express promise on the part of the mortgagor to pay is not necessary to sustain the claim; *Critcher v. Walker*, 5 N. C. (1 Murph.) 488, 4 Am. Dec. 576, holding the want of a covenant for the repayment of the mortgage money was no bar to a redemption; *Goodman v. Grierson*, 18 E. R. C. 6, 2 Ball. & B. 274, 12 Revised Rep. 82; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847,—holding it is not essential to the validity of a mortgage that it contains a covenant to repay the money paid; *Demond v. Crary*, 9 Fed. 730, holding an action might be maintained on a mortgage debt though the mortgage contain no covenant for payment, where competent proof of the debt is made; *Brown v. Dewey*, 1 Sandf. Ch. 70; *Kerr v. Gilmore*, 6 Watts, 405 (dissenting opinion); *Hoff's Appeal*, 24 Pa. 200; *Moss v. Green*, 10 Leigh, 251, 34 Am. Dec. 731 (dissenting opinion); *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed. Cas. No. 1,331; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638,—on the absence of a covenant to pay as not affecting the validity of a mortgage; *Knolan v. Dunn*, Russell (N. S.) 504, holding the non-existence of an obligation to repay the money loaned is not conclusive that a conveyance was not intended to operate as a mortgage.

—Rights of mortgagor and mortgagee in property.

Cited in *Burton v. Tannehill*, 6 Blackf. 470, holding a mortgagee by recovering a judgment for the mortgage debt did not waive his right to a lien on the

goods: *Wolff v. Farrell*, 3 Brev. 68 (dissenting opinion), on mortgagee as having no right to maintain trover or detinue for the recovery of a chattel.

Cited in note in 18 E. R. C. 379, on mortgagor's estate in mortgaged property till foreclosure.

Marshalling of assets to pay decedent's debts.

Cited in *Hayes v. Jackson*, 6 Mass. 149, holding on an application for leave to sell real estate for the payment of debts, devised land not included in a specific devise would first be sold and next the land descending to the heirs; *Cranmer v. McSwords*, 24 W. Va. 594; *Ruston v. Ruston*, 2 Yeates, 54, 1 Am. Dec. 283,—on the marshalling of assets to satisfy the debts of a decedent; *Elliott v. Carter*, 9 Gratt. 541, on personal estate as being the primary fund for the payment of debts.

Property subject to satisfaction of mortgage debt.

Cited in *Duke of Cumberland v. Codrington*, 3 Johns. Ch. 226, holding that if purchaser of encumbered land, renders himself personally liable to creditor for payment, land is primary fund for payment; *Mollan v. Griffith*, 3 Paige, 402, on whether mortgage debt is to be satisfied out of personal or real estate.

Resort to personality to satisfy debts chargeable on realty.

Cited in *Darrington v. Borland*, 3 Port. (Ala.) 1, on debts chargeable by will upon realty as not to be satisfied out of profits until after sale of land a deficit should be declared.

Cited in note in 18 E. R. C. 190, on liability of personal estate of decedent to payment of mortgage debts.

Debts impliedly charged on property.

Cited in *Lansdale v. Ghequiere*, 4 Harr. & J. 257, on making the payment of debts a charge on property by implication.

Specialty and simple contract debts.

Cited in *Post v. Mackall*, 3 Bland, Ch. 483, distinguishing between specialty and simple contract debts.

Right to rents and profits of estate of decedent.

Cited in *Gibson v. Farley*, 16 Mass. 280, holding the heirs of a deceased insolvent were entitled to the rents and profits of the mortgaged real estate until entry by the mortgagee; *Lyon v. Brown University*, 20 R. I. 53, 37 Atl. 309, on rents and profits of estate accruing before its sale belong to whom.

Action on secured debt.

Cited in *Reynolds v. Carter*, 12 Leigh, 166, 37 Am. Dec. 642, on the loss of property pledged as security for a debt as not defeating a right to recover the debt; *Jardine v. McAuley*, 10 N. B. 372, holding assumpsit would not lie to recover a balance due on an account which was secured by a mortgage containing a covenant to pay the amount due.

Necessity of election by devisee.

Cited in note in 10 E. R. C. 323, on necessity of devisee who accepts devise relinquishing all claims to estate devised to another.

18 E. R. C. 6, *GOODMAN v. GRIERSON*, 2 Ball & B. 274, 12 Revised Rep. 82.

Mortgage or conditional sale or absolute sale.

Cited in *Jewett v. Cunard*, 3 Woodb. & M. 277, Fed. Cas. No. 7,310, holding that where conveyance is absolute on its face, yet if it was made to secure debt, grantee will be bound to account for rents and profits and sales, towards payment of debt; *Sewall v. Henry*, 9 Ala. 24, holding a bill of sale for a negro

at an agreed price and a separate agreement in writing by which vendee agreed to sell the slave to the vendor if asked within a specific time did not constitute a mortgage; *Murphy v. Barfield*, 27 Ala. 634, holding a written contract for the sale of slaves contain a reservation of a right on the part of the vendor to redeem within a certain time constituted a conditional sale; *West v. Hendrix*, 28 Ala. 226, holding a conveyance made in satisfaction of a precedent debt, with a right of redemption did not constitute a mortgage; *Chase's Case*, 1 Bland, Ch. 206, 17 Am. Dec. 277, holding an absolute sale of property with a condition for a repurchase did not constitute a mortgage, no rights being reserved to the purchaser in case of a loss before such redemption; *Flagg v. Mann*, 14 Pick. 467, holding the giving of a quit claim deed with a condition for a reconveyance, for an advance of money did not constitute a mortgage no liability vesting in the vendor to repay the money advanced; *Murphy v. Calley*, 1 Allen, 107, holding an absolute deed of land with a covenant for a reconveyance within a certain time if the grantor repays the sum advanced and that if the grantor did not repay such sum the deed should be absolute constituted a mortgage; *Cowell v. Craig*, 79 Fed. 685, holding the giving of an absolute deed for a loan with an agreement to reconvey on payment of a certain sum and the giving of a lease of the property by the grantee to the grantor constituted such transaction a conditional sale; *Purvis v. Hume*, 8 N. B. 299, holding an agreement where lessee who is in arrears with his rent surrenders his interest under the lease and the landlord releases the arrears of rent and agrees to renew the lease on payment of the debt constituted a conditional agreement for a lease and not a mortgage; *Galt v. Jackson*, 9 Ga. 151; *Northern C. R. Co. v. Hering*, 93 Md. 164, 48 Atl. 461; *Rockwell v. Humphrey*, 57 Wis. 410, 15 N. W. 394; *Henderson v. Comeau*, Russell (N. S.) 87; *Rapson v. Hersee*, 16 Grant, Ch. (U. C.) 685; *Doyle v. Dulhanty*, 23 N. S. 78; *Porter v. Clements*, 3 Ark. 364,—on whether a transaction constitutes a mortgage or a conditional sale; *Pace v. Bartles*, 47 N. J. Eq. 170, 20 Atl. 352; *Glover v. Payn*, 19 Wend. 518; *De Bruhl v. Maas*, 54 Tex. 464; *Low v. Henry*, 9 Cal. 538,—on what must appear in order to constitute a deed a mortgage; *Hughes v. Sheaff*, 19 Iowa, 335, on the presumption of law in doubtful cases as being rather in favor of a mortgage than a conditional sale.

Cited in 2 Devlin, Deeds, 3d ed. 2110, on enforcement of contract as conditional sale where intent appears; 2 Devlin, Deeds, 3d ed. 2147, on once a mortgage always a mortgage; 2 Devlin, Deeds, 3d ed. 2115, on rights of parties where deed executed as security for money.

— Admissibility of parol evidence.

Cited in *Cold v. Beh*, 152 Iowa, 368, 132 N. W. 73, holding that parol evidence to show that deed is mortgage must be clear and satisfactory; *Matthews v. Holmes*, C. R. 2 A. C. 230 (affirming 5 Grant, Ch. (U. C.) Can. 40), on the admissibility of parol evidence to show an absolute deed to be a mortgage.

Mutuality of rights and remedies in mortgage.

Cited in *Robinson v. Cropsey*, 2 Edw. Ch. 138; *Slutz v. Desenberg*, 28 Ohio St. 371; *Swetland v. Swetland*, 3 Mich. 482,—on necessity that mutuality of remedies be shown in order to constitute an absolute deed a mortgage.

Obligation or debt in mortgage.

Cited in *Robinson v. Farrelly*, 16 Ala. 472, holding the failure of a vendee to take from vendor some evidence of a debt is not conclusive to show that a sale and not a mortgage was intended; *Moss v. Green*, 10 Leigh, 251, 34 Am. Dec. 731 (dissenting opinion), on it not being necessary that there be a covenant in a deed to repay the money in order to constitute it a mortgage; *Knolan v. Dunn*,

Russell (N. S.) 504, on the nonexistence of an obligation to repay the money loaned as creating an inference that the conveyance did not create a mortgage.

Cited in note in 18 Eng. Rul. Cas. 4, on essential character of a mortgage.

Cited in 2 Washburn, Real Prop. 6th ed. 41, on validity of mortgage without personal obligation.

Explained in *Brown v. Dewey*, 1 Sandf. Ch. 56, holding the absence of the personal liability of the grantor to repay the money is not a conclusive test in deciding whether the conveyance is absolute or intended as a security.

Extinguishment of equity of redemption by agreement.

Cited in *Perkins v. Drye*, 3 Dana, 170, holding the taking of a horse of the value of forty dollars as a consideration for the giving up of a right of redemption in slaves of a value of nearly a thousand dollars was not a sufficient consideration to extinguish such right of redemption; *Wilson v. Giddings*, 28 Ohio St. 554; *Flagg v. Mann*, 2 Sumn. 486, Fed. Cas. No. 4,847; *Holridge v. Gillespie*, 2 Johns. Ch. 30,—on right to make contract extinguishing right of redemption.

Cited in note in 18 Eng. Rul. Cas. 173, on who may redeem mortgage.

Necessity of mortgagee electing between remedies.

Cited in *Andrews v. Scotton*, 2 Bland, Ch. 629, holding a mortgagee could not sue upon the bond for his debt and also have a foreclosure of the mortgage.

Liability of mortgagor to satisfy mortgage debt.

Cited in *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed. Cas. No. 1,331, on right where deed construed a mortgage and the value of the property is less than the debt to recover the balance from the mortgagor.

18 E. R. C. 16, *TEBB v. HODGE*, 39 L. J. C. P. N. S. 56, L. R. 5 C. P. 73, 21 L. T. N. S. 499.

Equitable mortgages.

Cited in *Gaar Scott Co. v. Ottoson*, 21 Manitoba L. Rep. 462, holding that contract to give mortgage gives rise to existence of equitable mortgage; *Parish v. Poole*, 53 L. T. N. S. 35, on the creation of equitable mortgages.

Cited in 2 Washburn, Real Prop. 6th ed. 136, on equitable mortgage embracing after acquired property.

18 E. R. C. 26, *RUSSEL v. RUSSEL*, 1 Bro. Ch. 269.

Mortgage, lien or trust by deposit of title papers or the like.

Cited in *Brown v. Chamberlain*, 9 Fla. 464, holding a delivery by a debtor of packages containing votes and drafts with verbal directions that the proceeds should be divided among his creditors was valid on the acceptance of the trust by the assignees; *Crain v. Paine*, 4 Cush. 482, 50 Am. Dec. 807, holding a mortgage of personal property by a delivery of the deed and note to the assignee may create an equitable assignment; *Meador v. Everett*, 3 Dill. 214, Fed. Cas. No. 9,376, holding the assignment and delivery of a lease by the lessor to secure a debt is valid as against the assignee in bankruptcy; *United States v. Cutts*, 1 Sumn. 133, Fed. Cas. No. 14,912, on the transfer of shares of stock as creating an equitable lien; *Gale v. Morris*, 29 N. J. Eq. 222, holding that equitable mortgage may arise from nonpayment of purchase money, deposit of title deeds, or unsuccessful attempt to make valid mortgage; *Hutzler Bros. v. Phillips*, 26 S. C. 136, 24 Am. St. Rep. 687, 1 S. E. 502, holding that deposit of title deeds for purpose of enabling attorney of lender to prepare legal mortgage, does not raise

equitable mortgage; *Zimmerman v. Sproat*, 26 Ont. L. Rep. 448, 5 D. L. R. 452, holding that intent to create equitable mortgage by delivery of writings may be established by parol evidence; *Matthews v. Holmes*, 5 Grant, Ch. (U. C.) 1 (affirmed in C. R. 2 H. C. 230), holding that equitable mortgage could be created by parol agreement with deposit of title deeds.

Cited in notes in 18 E. R. C. 46, on deposit of title deeds as equitable mortgage with creditor of third person; 18 E. R. C. 35, on parol evidence of new agreement as to subsequent advance in case of equitable mortgage by deposit of deeds.

Cited in 2 Washburn, Real Prop. 6th ed. 77, on equitable mortgage by deposit of title deeds; 1 Beach, Trusts, 600, on trust from deposit of title deeds.

—Equitable land mortgages.

Cited in *Ex parte Kensington*, 18 E. R. C. 30, 2 Ves. & B. 79, 13 Revised Rep. 32, 2 Rose, 138, holding an equitable mortgage might be created by the deposit of title deeds as a pledge; *Smalley v. Clark*, 22 Vt. 598; *Hanger v. Fowler*, 20 Ark. 667,—as introducing the doctrine of equitable mortgages by means of the deposit of title deeds; *Parker v. Housefield*, 18 E. R. C. 497, 2 Mylne & K. 419; *Griffin v. Griffin*, 18 N. J. Eq. 104,—on the creation of an equitable mortgage by the mere deposit of title deeds with the creditor; *Sidney v. Stevenson*, 11 Phila. 178, 33 Phila. Leg. Int. 42, on a deposit of title deeds as not creating a parol mortgage; *Upham v. Brooks*, 2 Woodb. & M. 407, Fed. Cas. No. 16,797, on the pledge or assignment of a mortgage as creating an equitable mortgage; *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427, on the creation of a lien by the deposit of title deeds.

Distinguished in *Re Snyder*, 138 Iowa, 553, 19 L.R.A.(N.S.) 206, 114 N. W. 615, holding by reason of statutory provisions the mere deposit of title deeds does not create an equitable mortgage; *Probasco v. Johnson*, 2 Disney (Ohio) 96, holding no equitable lien created on real estate by the deposit of a title deed although accompanied by a parol declaration of the purpose for which the deposit was made.

Disapproved in *Gardner v. McClure*, 6 Minn. 250, Gil. 167, holding the deposit of title deeds with a creditor as a security for a debt would create no estate in the land in favor of the creditor.

Equitable aid of mortgage or lien.

Cited in *National Bank v. Lanier*, 7 Hun, 623, holding that defective mortgage given to secure antecedent debt can be sustained in equity so as to make it prior lien to subsequent judgments; *Lanning v. Tompkins*, 45 Barb. 308, holding an attempt to create a lien which should have precedence would be given effect in equity where because of a defect in a statute the strict formalities were not complied with; *Burdick v. Jackson*, 7 Hun, 488, holding a parol agreement to give a mortgage would be treated in equity as a mortgage; *De Peyster v. Hasbrouck*, 11 N. Y. 582, holding equity would perform a mortgage so as to make it include what mortgagor represented to mortgagee that it included as against a conveyance in trust for mortgagor's wife; *Rochester Sav. Bank v. Averell*, 96 N. Y. 467, holding where the assent necessary to the validity of a mortgage executed by a corporation had not been secured such assent may be supplied subsequently if no rights have intervened.

Creation of equitable mortgage.

Cited in *Atkinson v. Miller*, 34 W. Va. 115, 9 L.R.A. 544, 11 S. E. 1007, holding that paper made for deed of trust, conveying land to secure debt, signed by grantor but without seal, is equitable mortgage.

Validity of equitable assignment of a chose in action.

Cited in *Todd v. Phoenix & U. F. Ins. Co.* 3 B. C. 302, holding that equitable assignment of chose is valid and takes priority of subsequent attaching order of debt so assigned.

18 E. R. C. 30, *EX PARTE KENSINGTON*, 2 Rose, 138, 13 Revised Rep. 32, 2 Ves. & B. 79.

Equitable mortgage or trust by deposit of title deeds.

Cited in *Rockwell v. Hobby*, 2 Sandf. Ch. 9, holding evidence of an advance of money and finding of title deeds of the borrower in possession of the lender, establishes an equitable mortgage; *Griffin v. Griffin*, 18 N. J. Eq. 104; *Hutzler Bros. v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 687, 1 S. E. 502; *Gardner v. McClure*, 6 Minn. 250, Gil. 167,—on the creation of an equitable mortgage by the deposit of title deeds: *Upham v. Brooks*, 2 Woodb. & M. 407, Fed. Cas. No. 16,797, on the pledge or assignment of a mortgage as creating an equitable mortgage.

Cited in note in 18 E. R. C. 29, on deposit of title deeds as an equitable mortgage.

Cited in 1 Beach, *Trusts*, 600, on trust from deposit of title deeds; *Browne*, Stat. Frauds, 5th ed. 74, on modes of conveying interest in land without writing.

—By deposit of title deeds with memorandum.

Cited in *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. 494, holding a deposit of title deeds constituted an equitable mortgage though accompanied with an agreement to constitute a legal mortgage.

—Admissibility of parol evidence.

Cited in *Zimmerman v. Sproat*, 26 Ont. L. Rep. 448, 5 D. L. R. 452, holding that interest to create equitable mortgage by delivery of writings may be established by parol evidence.

Lien by possession.

Cited in *Sparhawk v. Drexel*, 12 N. B. R. 450, Fed. Cas. No. 13,204, 1 W. N. C. 560, holding that where debtor knows that two houses are composed of same persons, their is general lien in favor of either, upon any surplus upon securities in hands of other; *Zollar v. Janvrin*, 49 N. H. 114, 6 Am. Rep. 469, on possession of property as not necessary to the creation of a lien.

Equitable mortgages for future advances.

Cited in *Townsend v. Empire Stone-Dressing Co.* 6 Duer. 208, on when equitable mortgages will stand for future advances.

Change in creditor firm as affecting right to enforce debt or liens.

Cited in *Forst v. Kirkpatrick*, 64 N. J. Eq. 578, 54 Atl. 554, holding when a mortgage is given a firm and one of the members retires, the new firm cannot enforce the obligation, unless the right acquired by a new contract; *Cosgrave Brewing & Malting Co. v. Starrs*, 11 Ont. App. Rep. 156, on the effect of the death of a member of a firm on a guaranty to the firm.

Cited in *Parsons*, Partn. 4th ed. 315, as to how guaranty is affected by change in firm.

Respective rights of joint and separate creditors of bankrupt partnership.

Cited in note in 4 E. R. C. 121, on respective rights of joint and separate creditors of bankrupt partnership.

18 E. R. C. 35, *EX PARTE WETHERELL*, 11 Ves. Jr. 398.

Equitable mortgage by deposit of title deeds.

Cited in 2 Washburn, Real Prop. 6th ed. 77, on equitable mortgage by deposit of title deeds.

18 E. R. C. 40, *ASHTON v. DALTON*, 2 Colly. Ch. Cas. 565, 10 Jur. 451.

Interest after maturity of debt as damages.

Cited in *Mellersh v. Brown*, L. R. 45 Ch. Div. 225, 60 L. J. Ch. N. S. 43, 63 L. T. N. S. 189, 38 Week. Rep. 732, on damages for interest after due day.

Parol evidence of new agreement as to subsequent advance in case of equitable mortgage by deposit of deeds.

Cited in note in 18 E. R. C. 34, on parol evidence of new agreement as to subsequent advance in case of equitable mortgage by deposit of deeds.

18 E. R. C. 44, *EX PARTE, COMING*, 7 Revised Rep. 149, 9 Ves. Jr. 115.

Equitable mortgage by deposit of title papers.

Cited in *Rockwell v. Hobby*, 2 Sandf. Ch. 9, on the creation of an equitable mortgage by the deposit of title deeds: *Wellborn v. Williams*, 9 Ga. 86, 52 Am. Dec. 427, distinguishing the lien of the vendor for the purchase money in that it is not by consent.

Cited in note in 18 E. R. C. 29, on deposit of title deeds as an equitable mortgage.

Cited in 2 Washburn, Real Prop. 6th ed. 77, on equitable mortgage by deposit of title deeds.

Distinguished in *Hutzler Bros. v. Phillips*, 26 S. C. 136, 4 Am. St. Rep. 687, 1 S. E. 502, holding the deposit of title deeds for the purpose of enabling the attorney of the lender to prepare a legal mortgage in accordance with an agreement to that effect does not raise an equitable mortgage.

Disapproved in *Probacco v. Johnson*, 2 Disney (Ohio) 96, holding the deposit of title deeds did not create an equitable lien although accompanied by a parol declaration of such a purpose.

18 E. R. C. 48, *ALTON v. HARRISON*, 38 L. J. Ch. N. S. 669, L. R. 4 Ch. 622, 21 L. T. N. S. 282, 17 Week. Rep. 1034.

Right to rebut presumption of fraud in a conveyance.

Cited in *Austin v. Sprague Mfg. Co.* 14 R. I. 464, on right to explain provisions in a deed only prima facie dishonest by evidence tending to remove the evidence of fraud; *Pyeatt v. Powell*, 2 C. C. A. 367, 10 U. S. App. 200, 51 Fed. 551, on right to rebut presumption of fraud in a mortgage prima facie fraudulent.

Transfers by insolvents.

Cited in *Re Hurst*, 6 Ont. Pr. Rep. 329, on the construction of the words "in contemplation of insolvency."

—Conveyances or mortgages fraudulent as to creditors.

Cited in *Graham v. Bell*, 17 N. S. 90, holding that if deed of land is bona fide, it makes no difference under statute whether it is of whole or only part of premises; *Allan v. McTavish*, 8 Ont. App. Rep. 440, holding a conveyance by a father to his sons, with the taking back of mortgages to secure the support of himself and wife for the remainder of their life was not fraudulent as to creditors; *Cummings v. McDonald*, 27 N. S. 53; *McClary Mfg. Co. v. H. S. Howland Sons & Co.* 9 B. C. 479; *Stecher Lithographic Co. v. Ontario Seed Co.* 22

Ont. L. Rep. 577,—holding that deed given for purpose of creating fraudulent preference is void as to creditors; Hurley v. Archibald, 22 N. S. 27, holding an assignment made by an insolvent debtor for the purpose of securing certain of his creditors was not fraudulent as to the others; Adams v. Bank of Montreal, 8 B. C. 314, on when mortgage by insolvent debtor not fraudulent as to creditors.

Cited in Underhill, Am. Ed. Trusts, 123, on validity of declared trust as against creditors.

Distinguished in Merchants' Bank v. Clarke, 18 Grant, Ch. (U. C.) 594, holding a sale although bona fide is void as to creditors where it is designed to defeat them for the personal benefit of the vendor.

—In anticipation of defeat in pending actions.

Cited in Doe ex dem. Jones v. Nevers, 18 N. B. 627, on sale of property as not being fraudulent against creditors merely because made with the intention of defeating a particular execution; Gurofski v. Harris, 27 Ont. Rep. 201, holding a conveyance of land by a father to daughter pending an action of slander against the father, and of which the daughter was aware, in satisfaction of a bona fide debt was not fraudulent as to the person becoming a judgment creditor in the action of slander; Brown v. Sweet, 7 Ont. App. Rep. 725, holding a chattel mortgage executed by trustees of a church to secure a loan to pay off urgent claims, pending an action against them was not fraudulent.

Distinguished in Re Moroney, Ir. L. R. 21 Eq. 27, holding it was fraudulent for a debtor to part with his property without consideration to delay a particular creditor.

—Subgrantees with notice of fraud.

Cited in Totten v. Douglas, 18 Grant, Ch. (U. C.) 341, holding an assignee for a valuable consideration of a mortgage from the father to a son for a pretended debt, had priority over subsequent execution creditors of the mortgagor, although he had notice of the nature of the mortgage; Dalglish v. McCarthy, 19 Grant, Ch. (U. C.) 578, holding a bona fide purchase from a grantee who had given no consideration and who had taken a conveyance fraudulent as to creditors was valid although the purchaser had notice of the fraud.

—Conveyance to or in trust for part of creditors.

Cited in Morrison v. Shuster, 1 Mackey, 190, holding that insolvent debtor may lawfully prefer one creditor to another; Griffiths v. Boscowitz, Cameron (Can.) 245, on right to set aside conveyance to creditor as fraudulent; Whitman v. Union Bank, 16 Can. S. C. 410 (dissenting opinion); Slater v. Badenach, 10 Can. S. C. 296,—on assignments preferring certain creditors as not being necessarily fraudulent and void; Molson Bank v. Halter, 18 Can. S. C. 88 (dissenting opinion), on a mortgage by an insolvent to secure a debt as not void as to creditors; Bolero v. London & W. Discount Co. L. R. 5 Exch. Div. 47, 42 L. T. N. S. 56, 28 Week. Rep. 154, holding a conveyance in trust for the benefit of such creditors as complied with the terms of the deed was not fraudulent as to creditors; Allen v. Bonnett, L. R. 5 Ch. 577, 23 L. T. N. S. 437, 18 Week. Rep. 874; Ex parte Games, L. R. 12 Ch. Div. 314, 40 L. T. N. S. 789, 27 Week. Rep. 744,—holding an assignment of all the grantor's property present and future in consideration of past debts and future advances was not fraud necessarily fraudulent as to creditors; Maskelyne v. Smith [1902] 2 K. B. 158, 71 L. J. K. B. N. S. 476, 86 L. T. N. S. 832, 18 Times L. R. 498, 9 Manson, 139, affirmed in [1903] 1 K. B. 671, 72 L. J. K. B. N. S. 237, 88 L. T. N. S. 148, 51 Week. Rep. 372, 10 Manson, 121, 19 Times L. R. 270, holding a deed of arrangement

with creditors was not void as to creditors not included within the arrangement.

Cited in notes in 31 L.R.A. 616, on participation in fraudulent intent of debtor which will invalidate transfer to pay or secure debt as to other creditors; 12 E. R. C. 348, on giving security to famed creditors not being fraud.

— Good faith as test of validity.

Cited in *McDonald v. Cummings*, 24 Can. S. C. 321 (reversing 27 N. S. 53); *Brown v. Jowett*, 4 B. C. 44,—on a conveyance as not being fraudulent to creditors where it is not a cloak or method of retaining a benefit for the grantor; *Edison General Electric Co. v. Vancouver & N. W. Tramway Co.* 4 B. C. 460, on a confession of judgment as being good within the statute of frauds where not a cloak for retaining a benefit for the person against whom obtained.

Mortgage when a bona fide one.

Cited in *Roff v. Kreckler*, 8 Manitoba L. Rep. 230, on when mortgage is a bona fide one within the meaning of the statute of frauds.

Burden of proof where conveyances attacked as fraudulent.

Cited in *Hartlen v. Adams*, 40 N. S. 96, holding the burden of proof rested on creditors seeking to attack a conveyance by a married woman of her separate property as fraudulent, where there was a valuable consideration for the security given.

Retention of possession as badge of fraud.

Cited in 2 *Mechem*, Sales, 816, on retention of possession by seller as badge of fraud.

18 E. R. C. 56, *EDWARDS v. HARBEN*, 1 Revised Rep. 548, 2 T. R. 587.

Validity as to creditors of sale without change of possession.

Cited in *Killough v. Steele*, 1 Stew. & P. (Ala.) 262, holding that bill of sale with conditions of defeasance, founded on valuable consideration, is not fraudulent per se as to creditors, where possession remains with grantor for more than year; *Hall v. Parsons*, 15 Vt. 358 (dissenting opinion); *Wolff v. Farrell*, 3 Brev. 68,—on necessity that possession accompany a transfer of personalty; *Woods v. Bugby*, 29 Cal. 466, holding a sale of a kiln of bricks before burning was completed was void as to attacking creditors where possession was retained by the vendor; *Jennings v. Carter*, 2 Wend. 446, 20 Am. Dec. 635, holding the retention by vendor of chattels after sale without any agreement is fraudulent as to creditors unless sufficient reason be shown justifying the course; *Sturtevant v. Ballard*, 9 Johns, 337, 6 Am. Dec. 281, holding a sale of chattels with an agreement for retention of possession by vendor was fraudulent and void as to the judgment creditor of vendor; *Monroe v. Hussey*, 1 Or. 188, 75 Am. Dec. 552, holding an absolute bill of sale unaccompanied with delivery of the property is void as to creditors; *Stephens v. Gifford*, 137 Pa. 219, 21 Am. St. Rep. 868, 20 Atl. 542, 27 W. N. C. 30, 48 Phila. Leg. Int. 148, holding a vendee of chattels failing to take possession loses his title as against a subsequent innocent purchaser from the vendor; *Ragan v. Kennedy*, 1 Overt. 91, holding that bill of sale of slaves made by person indebted, who retains possession after execution of bill of sale is void as against creditors; *Shields v. Anderson*, 3 Leigh, 729, holding a bill of sale of chattels where the vendee does not take possession until after death of vendor is fraudulent and void as to creditors; *Tavener v. Robinson*, 2 Rob. (Va.) 280, holding the retention of a slave by a vendor until after an execution against the vendor was levied upon the slave rendered such sale fraudulent and void as to such creditor; *Smith v.*

Ringgold, 4 Cranch, C. C. 124, Fed. Cas. No. 13,101, holding a deed by the terms of which possession was to accompany the deed was void as to creditors of vendor where he retained possession of the property; *Jackson v. Bank of Nova Scotia*, 9 Manitoba L. Rep. 75, holding that sale without delivery and change of possession is void against creditors.

Cited in note in 5 E. R. C. 27, on necessity of change of possession on sale of chattels.

Distinguished in *Sydnor v. Gee*, 4 Leigh, 535, holding an absolute sale of slaves was not fraudulent and void as to creditors of vendor where the vendee immediately redelivers the slaves to the vendor under a contract of hire.

— Continued possession as badge of fraud or as fraud per se.

Cited in *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500; *Ingalls v. Herrick*, 108 Mass. 351, 11 Am. Rep. 360; *Claffin v. Rosenberg*, 42 Mo. 439, 97 Am. Dec. 336; *Wilson v. Walrath*, 103 Minn. 412, 24 L.R.A.(N.S.) 1127, 115 N. W. 203; *Putnam v. Osgood*, 52 N. H. 148, 5 Legal Gaz. 260; *Seward v. Jackson*, 8 Cow. 406; *Hanford v. Arther*, 4 Hill, 271; *Cotton v. Evans*, 21 N. C. (1 Dev. & B. Eq.) 284; *Rivers v. Thayer*, 7 Rich. Eq. note 136; *Burgess v. Chandler*, 4 Rich. L. 170 (dissenting opinion); *Earr v. Sims*, Rich. Eq. Cas. 122, 24 Am. Dec. 396; *Nelson v. Good*, 20 S. C. 223; *Callen v. Thompson*, 3 Yerg. 475, 24 Am. Dec. 587; *Land v. Jeffries*, 5 Rand (Va.) 599; *Meeker v. Wilson*, 1 Gall. 419, Fed. Cas. No. 9,392; *Belanger v. Menard*, 27 Ont. Rep. 209; *Andrews v. Bonnett*, 14 N. S. 313; *Ayres v. Moore*, 2 Stew. (Ala.) 336,—on possession by vendor of personal property sold as evidence of fraud: *Pattison v. Letton*, 56 Mo. App. 325; *Marvin Safe Co. v. Norton*, 48 N. J. L. 410, 57 Am. Rep. 566, 7 Atl. 418; *Stoddard v. Butler*, 20 Wend. 507; *Griswold v. Sheldon*, 4 N. Y. 581 (dissenting opinion); *Braun v. Keller*, 43 Pa. 104, 82 Am. Dec. 554; *Fulmore v. Burrows*, 2 Rich. Eq. 95; *Mason v. Bond*, 9 Leigh, 181, 33 Am. Dec. 243; *Fuller v. Sears*, 5 Vt. 527; *Warner v. Norton*, 20 How. 448, 15 L. ed. 950; *Maulson v. Joseph*, 8 U. C. C. P. 15; *Tarratt v. Sawyer*, 1 N. S. 46; *Oriental Bank v. Haskins*, 3 Met. 332, 37 Am. Dec. 140,—on possession by vendor under absolute sale of personalty as conclusive of fraud: *Taney v. Penn Nat. Bank*, 109 C. C. A. 437, 187 Fed. 689, holding that under law of Pennsylvania, fraud is not imputed because of retention of personalty by vendor, where subject of sale is not reasonably capable of delivery; *Gibson v. Love*, 4 Fla. 217, holding fraud was to be inferred where a vendor retained possession of a slave after a sale thereof; *Powers v. Green*, 14 Ill. 386, holding the remaining of a debtor in possession after making preference of a creditor by the execution of a bill of sale was not conclusive of fraud; *State v. Bethune*, 30 N. C. (8 Ired. L.) 139, holding that where son, being insolvent, conveyed property to his father for apparently valuable consideration, and was permitted to remain in possession presumption of fraud is raised; *Weeks v. Wead*, 2 Aik. (Vt.) 64, holding a sale of a horse was fraudulent per se as to creditors of vendor where he remained in possession under an agreement with the vendee; *Allan v. McTavish*, 8 Ont. App. Rep. 440, on the question of fraud in the transfer of personalty as being one for the jury.

Cited in note in 24 L.R.A.(N.S.) 1132, 1133, 1149, as to whether presumption of fraud flowing from retention of chattel by vendor may be overcome.

Cited in 2 Mechem, Sales, 816, on retention of possession by seller as badge of fraud.

Distinguished in *Pregnall v. Muller*, 21 S. C. 385, 53 Am. Rep. 684, holding court erred in charging, that where vendor retains possession of personalty sold upon consideration of a pre-existing debt, that such retention was per se fraud-

ulent; *Charlton v. Gardner*, 11 Leigh, 281, holding deed of slaves by father to son duly recorded the slaves remaining in the possession of the donor was not fraudulent per se as to creditors.

Disapproved in *Hall v. Tuttle*, 8 Wend. 375; *Smith v. Henry*, 1 Hill, L. 16; *Davis v. Turner*, 4 Gratt. 422; *Bindley v. Martin Bros.* 28 W. Va. 773; *Hobbs v. Bibb*, 2 Stew. (Ala.) 54,—holding possession of personal property remaining with the seller after an absolute sale is only presumptive evidence of fraud; *Smith v. Niel*, 8 N. C. (1 Hawk.) 341; *Shireff v. McKeen*, 23 N. B. 184; *Trotter v. Howard*, 8 N. C. (1 Hawks.) 320, 9 Am. Dec. 640,—holding possession by vendor after sale of chattels is only evidence of fraud; *Howard v. Prince*, 1 Hughes, 239, Fed. Cas. No. 6,762, holding the possession by vendor after bill of sale of fixtures was not per se fraudulent.

— **Divided or concurrent possession.**

Cited in *Bawn v. Keller*, 3 Grant, Cas. 144, holding concurrent possession of property by the vendor and vendee of personalty would not protect the property from the creditors of the vendor.

— **Where sale is conditional or for security.**

Cited in *Runyon v. Groshon*, 12 N. J. Eq. 86; *Watson v. Rowley*, 63 N. J. Eq. 195, 52 Atl. 160; *Hall v. Snowhill*, 14 N. J. L. 8; *Miller v. Shreve*, 29 N. J. L. 250; *Jaudon v. Gourdin*, Rich. Eq. Cas. 246; *Hirshkind v. Israel*, 18 S. C. 157; *Travis v. Claiborne*, 5 Munf. 435; *Tucker v. Tilton*, 55 N. H. 223,—on retention of possession by chattel mortgagor as affecting the validity of the mortgage; *Malone v. Hamilton*, Minor (Ala.) 286, 12 Am. Dec. 49, holding a conveyance of slaves as security for the payment of notes was not fraudulent and void because possession was not surrendered where by its terms the deed was to be void if the instalments were paid and the debt extinguished; *Roberts v. Hawn*, 20 Colo. 77, 36 Pac. 886, holding a conditional sale of personalty was not avoided by reason of fact that vendor remained in possession until the performance of the condition; *Maxwell v. Tufts*, 8 N. M. 396, 33 L.R.A. 854, 45 Pac. 979; *Adams v. Broughton*, 13 Ala. 731,—on possession by vendor under conditional sale of personalty as creating no presumption of fraud; *Homes v. Crane*, 2 Pick. 607, holding possession by a vendor under a bill of sale in effect only a mortgage of chattels was only prima facie evidence of fraud.

Distinguished in *Smith v. Acker*, 23 Wend. 653, holding by reason of statute the retention of possession by the mortgagor would not render a chattel mortgage fraudulent and void if shown not to be made with intent to defraud creditors; *Gist v. Pressley*, 2 Hill, Eq. 318, holding the mere retention of possession by the mortgagor until condition broken was not of itself evidence of fraud.

Disapproved in *Hankins v. Ingols*, 4 Blatchf. 35; *Cole v. White*, 26 Wend. 511; *Watson v. Williams*, 4 Blackf. 26, 28 Am. Dec. 36,—holding the retention of possession by a chattel mortgagor was not conclusive evidence of fraud; *Haven v. Low*, 2 N. H. 13, 9 Am. Dec. 25, holding possession by the mortgagee of personalty is not necessary to its validity; *Rose v. Burgess*, 10 Leigh, 186, holding the fact of possession of the chattels by the mortgagor for a period of five years did not render the mortgage fraudulent as to creditors of the mortgagor.

— **Sale or mortgage of ship.**

Distinguished in *Bartlett v. Williams*, 1 Pick. 288, holding the failure to take possession of a vessel on a sale with a condition for a reconveyance on the payment of a note did not affect the vendee's title as against an attachment made after possession taken; *White v. Thurman*, 24 Wend. 116, holding a mortgage of a vessel while on a voyage was void as to creditors where possession was not

delivered until after a levy of execution made against mortgagor **in favor** of a third person; *The Romp*, *Olcott*, 196, Fed. Cas. No. 12,030, holding a mortgage of a vessel while at sea without a delivery of possession would not affect the rights of a bona fide purchaser.

Distinguished in *Badlam v. Tucker*, 1 Pick. 389, 11 Am. Dec. 202, holding a mortgagee took valid title to a vessel notwithstanding fact that mortgagor was to retain possession until default in payment of notes.

— Possession left in debtor after levy of execution.

Cited in *Roberts v. Scales*, 23 N. C. (1 Ired. L.) 88; *United States v. Conyngham*, 4 Dall. 358, Fed. Cas. No. 14,850; *Zug v. Laughlin*, 23 Ind. 170,—holding an execution is fraudulent and void as against a subsequent execution where the creditor seized the goods on execution and allows them to remain in the hands of the debtor; *Houston v. Blake*, 43 N. H. 115; *Whipple v. Foot*, 2 Johns. 418, 3 Am. Dec. 442; *Rew v. Barber*, 3 Cow. 272; *Russell v. Gibbs*, 5 Cow. 390; *Dobson v. Edwin*, 18 N. C. (1 Dev. & B. L.) 569; *Huber v. Schnell*, 1 Browne (Pa.) 16; *Com. v. Kirkpatrick*, 1 Addison (Pa.) 193; *Fisher v. Vanmeter*, 9 Leigh, 18, 33 Am. Dec. 221; *Wood v. Gary*, 5 Ala. 43,—on possession by debtor after seizure on execution as rendering such execution void.

— Stay or delay as fraud.

Cited in *Wise v. Darby*, 9 Mo. 131, holding the lien of an execution is lost as to subsequent executions where it is directed to be stayed in the hands of the sheriff; *Crane v. Clarke*, 1 N. B. 202, holding an execution put in the hands of a sheriff with orders not to seize until danger of seizure under a second execution will not bind the goods so as to defeat a purchase of them before seizure actually made.

Necessity of transfer of possession to effect transfer as against creditors or subsequent purchaser.

Cited in *Williams v. Downing*, 18 Pa. 60, holding the retention of possession by lessee assigning his lease for years will not avoid the assignment in favor of a purchaser at a sheriff's sale under a judgment obtained subsequent to the assignment; *Osborne v. Tuller*, 14 Conn. 529, on the continued possession by an assignor after the assignment of personalty as fraud or evidence thereof; *Burchard v. Wright*, 11 Leigh, 463, holding the assent of an executor retaining possession to a specific legacy is void as to an innocent purchaser without notice of the assent.

Levy on goods held in fraud of creditors.

Cited in *Sage v. Wynkoop*, 16 Nat. Bankr. Reg. 363, Fed. Cas. No. 12,215, on right of sheriff to seize goods of debtor in hands of purchaser.

Delivery as necessary to the completion of a sale or transfer.

Cited in *Phelps v. Cutler*, 4 Gray, 137; *Land v. Jeffries*, 5 Rand. (Va.) 211; *Ludwig v. Fuller*, 17 Me. 162, 35 Am. Dec. 245,—on delivery as necessary to the completion of a sale; *Odiorne v. Colley*, 2 N. H. 66, 9 Am. Dec. 39, holding the taking of possession is necessary to a valid attachment of personalty.

Possession by vendor as evidence of a trust.

Cited in *Coburn v. Pickering*, 3 N. H. 415, 14 Am. Dec. 375, on possession of goods by vendor as conclusive evidence of a trust.

Priority gained by judgment creditors.

Cited in *Claffin v. Gordon*, 39 Hun, 54, holding the plaintiff first commencing a judgment creditor's action had priority over other creditors subsequently becoming parties to action.

Distinguished in *McBroom v. Rives*, 1 Stew. (Ala.) 72, holding an alias writ delivered to the sheriff will not extend or continue the lien of a prior returned writ.

Executor de son tort.

Cited in *Emery v. Berry*, 28 N. H. 473, 61 Am. Dec. 622, holding a father receiving the avails of the estate of his son without anything being disclosed for what purpose received might be held liable as an executor de son tort; *Cullen v. O'Hara*, 4 Mich. 132, on person coming into possession of property on death of intestate as liable to administrator therefor; *McKnight v. Morgan*, 2 Barb. 171 (dissenting opinion); *Babcock v. Booth*, 2 Hill, 181, 38 Am. Dec. 578; *Backhouse v. Jett*, 1 Broek. 500, Fed. Cas. No. 710; *Curry v. Brockway*, 12 Daly, 17,—on when person liable to personal representative of a decedent as an executor de son tort; *Chamberlayne v. Temple*, 2 Rand. (Va.) 384, 14 Am. Dec. 786, holding that in case of fraudulent conveyances, donee in possession is executor de son tort although there be rightful executor.

—Fraudulent transferee after death of transferer.

Cited in *Anderson v. Belcher*, 1 Hill. L. 246, 26 Am. Dec. 174; *Tucker v. Williams*, Dud. L. 329, 31 Am. Dec. 561; *Densler v. Edwards*, 5 Ala. 31,—holding a person in possession of goods after grantor's death, under a fraudulent deed of gift is chargeable as an executor de son tort; *Bailey v. Miller*, 27 N. C. (5 Ired. L.) 444, 44 Am. Dec. 47, holding same where father made a fraudulent conveyance of slaves to son shortly before his death and while insolvent; *Howland v. Dews*, R. M. Charl. (Ga.) 383, holding a vendee taking possession under a fraudulent deed the day before the death of the grantor was liable as an executor de son tort; *Clayton v. Tucker*, 20 Ga. 452, holding a wife taking possession through a trustee under a conveyance from her husband to defraud creditors becomes on the husband's death an executor de son tort as to creditors; *Allen v. Kimball*, 15 Me. 116, holding a person receiving a fraudulent bill of sale of personalty from an intestate during his life-time and selling it afterwards is liable to creditors as an executor de son tort; *Brennan v. Pardridge*, 67 Mich. 449, 35 N. W. 85, holding a person purchasing goods of an intestate on the day of his death was liable as an executor de son tort for such goods; *Everett v. Read*, 3 N. H. 54, holding defendant was answerable to administrator of an insolvent on a note held by the insolvent against him and which before his death he delivered to defendant to be cancelled without payment.

—Extent of liability.

Cited in *Kinard v. Young*, 2 Rich. Eq. 247, holding an executor de son tort was not liable for not reducing assets to possession and administering them.

Who may impeach a conveyance as fraudulent against creditors.

Cited in *Clarke v. Fullerton*, 8 N. S. 348, holding that an administrator could not come forwards as a volunteer for creditors and impeach a conveyance as fraudulent and void under Statute 13 Eliz. chap. 5.

Liability of person for consequences of wrongful act.

Cited in *Gerrish v. Edson*, 1 N. H. 82, holding that a sheriff who knowingly takes insufficient bail is liable for damages resulting to plaintiff.

18 E. R. C. 68, *CRACKNALL v. JANSON*, L. R. 11 Ch. Div. 1, 48 L. J. Ch. N. S. 168, 40 L. T. N. S. 640, 27 Week. Rep. 851, affirming 39 L. T. N. S. 31, 27 Week. Rep. 55.

Impertinence and scandal in pleading.

The decision of the Chancery Court was cited in *Burden v. Burden*, 124 Fed. Notes on E. R. C.—107.

250, holding allegations of extravagance even though redundantly stated were not impertinent or scandalous in a bill to protect certain joint interests from insolvency.

Right of court to strike out objectionable causes of action.

The decision of the Chancery Court was cited in *Guilbault v. Brothier*, 10 B. C. 449, on right of court without adjudicating between the parties to strike out objectionable causes of action.

Judicial cognizance of fraud of parties to action.

The decision of the Chancery Court was cited in *Lasell v. Thistle Gold Co.* 11 B. C. 466, as authority for proposition that courts will take cognizance of the fraud of parties.

Consolidation of causes of action.

Cited in *Silverthorn v. Glazebrook*, 30 Ont. Rep. 408, holding the plaintiff as the mortgagee of land of which the defendant was the owner of the equity of redemption might consolidate action in such case with an action of foreclosure of mortgage of lands of which he was the derivative mortgagee and defendant mortgagor.

Sufficiency of consideration.

The decision of the Chancery Court was cited in *Eggertson v. Nicastro*, 21 Manitoba L. Rep. 256, holding that pre-existing debt is sufficient consideration for deed; *Conrad v. Corkum*, 35 N. S. 288, holding the giving of time in connection with an antecedent indebtedness was a sufficient consideration for an assignment of property.

Cited in note in 12 Eng. Rul. Cas. 353, on sufficiency of consideration to support settlement as against subsequent purchasers.

Proposals in deeds.

The decision of the Chancery Court was cited in 1 Beach Contr. 88, on English doctrine of proposals in deeds.

18 E. R. C. 80, *HILL v. SPENCER*, Ambl. 641.

Bonds or other instruments given on immoral consideration.

Cited in *Hargroves v. Meray*, 2 Hill, Eq. 222, holding that a conveyance by a man to a woman with whom he was living in adultery is voluntary and subject to claims of his creditors; *Cusack v. White*, 2 Mill, Const. 279, 12 Am. Dec. 669, holding that deed conveying property to woman during illicit cohabitation is valid; *Re Vallance*, L. R. 26 Ch. Div. 353, 50 L. T. N. S. 574, 32 Week. Rep. 918, 48 J. P. 398, holding a bond given by a testator six months before his death to be paid at the end of two years to a woman with whom he had cohabited for years and with whom he continued to cohabit until his death, was good.

Cited in note in 48 L.R.A. 844, on injunction, in favor of party in *pari delicto*, against enforcing illegal contract.

Cited in 1 Beach Trusts, 560, on relief in equity only where equity is practised.

Seal as importing consideration.

Cited in *Yard v. Patton*, 13 Pa. 278, holding that seals of parties import consideration.

Relief against illegal transactions.

Cited in *Watson v. Fletcher*, 7 Gratt. 1, holding that court of equity will not give relief to either partner against the other, founded on transactions arising out of partnership for gambling.

18 E. R. C. 84, *PALMER v. BATE*, 2 Brod. & B. 673, 6 J. B. Moore, 28, 23 Revised Rep. 535.

Right of public officer to assign or create a lien on his salary.

Cited in *Schwenk v. Wyckoff*, 46 N. J. Eq. 560, 9 L.R.A. 221, 19 Am. St. Rep. 438, 20 Atl. 259, holding the unearned half pay of a retired officer of the army is not assignable; *Billings v. O'Brien*, 14 Abb. Pr. N. S. 238, 45 How. Pr. 392, holding an assignment by a public officer of a share of his pay to be earned for a certain month was invalid; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273, 48 How. Pr. 21, holding an assignment by public officer of the future salary of his office was void; *Sharp v. Edgar*, 3 Sandf. 379, holding that profits of public office is, upon grounds of public policy, not assignable; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 9 L.R.A. 706, 19 Am. St. Rep. 507, 25 N. E. 855, holding an assignment by a sheriff of fees for services to be thereafter rendered was void; *National Bank v. Fink*, 86 Tex. 303, 40 Am. St. Rep. 833, 24 S. W. 256, holding same where assessor gave a lien on such funds as would be coming to him from the county; *Cane v. Macdonald*, 10 B. C. 444, holding that firm of architects cannot claim right to salary of member of firm paid to him as public officer; *Stratford v. Wilson*, 8 Ont. Rep. 104, holding an agreement with a public officer to account for fees received outside his office was invalid; *Fisher v. Cook*, 32 N. S. 226; *Powell v. R.* 9 Can. Exch. 364,—on the salary of a public officer as not being assignable; *Hill v. Paul*, 8 Clark & F. 295, on the profits of a public officer as not being assignable for creditors.

Cited in note in 6 E. R. C. 344, on invalidity of agreement with sanction of superior for the assignment of an office.

Cited in *Benjamin, Sales*, 5th ed. 515, on invalidity of assignment of salary of a public office; 1 *Dillon, Mun. Corp.* 5th ed. 743; 2 *Beach, Contr.* 2084,—on validity of assignment of official salary before it is earned; 1 *Page, Contr.* 643, on validity of contract to assign official remuneration; 1 *Beach, Trusts*, 38, on property not the subject of a trust.

Distinguished in *Re Mirams* [1891] 1 Q. B. 594, 60 L. J. Q. B. N. S. 397, 64 L. T. N. S. 117. 39 Week. Rep. 464, 8 Morrell. 59, holding an assignment of the salary of the chaplain to a workhouse and workhouse infirmary is not void as against public policy.

18 E. R. C. 91, *GRENFELL v. WINDSOR*, 2 Beav. 544.

Nonassignability of pay of public officers.

Cited in *Fisher v. Cook*, 32 N. S. 226, on the salary of a school teacher as attachable for debt.

Cited in *Benjamin, Sales*, 5th ed. 515, on invalidity of contracts for sale of offices; *Underhill, Am. Ed. Trusts*, 60, as to what property is capable of being made the subject of a trust.

Defendant's right to move for discharge of a receiver pendente lite.

Cited in *High, Receiv.* 4th ed. 993, on defendant's right to move for discharge of receiver pendente lite.

18 E. R. C. 98, *KING v. SMITH*, 2 Hare, 239, 7 Jur. 694.

Liability of mortgagor to mortgagee in damages for waste.

Cited in *Delano v. Smith*, 206 Mass. 365, 30 L.R.A. (N.S.) 474, 92 N. E. 500, holding that mortgagor is liable to mortgagee for waste.

Equitable relief to mortgagee against waste of security.

Cited in *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep.

334, holding the mortgagee of a patent might sue to prevent infringement and for statutory damages.

Injunction to restrain waste by mortgagor.

Cited in *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90, holding that the removal of a house from the mortgaged premises would not be enjoined unless the value of the security was thereby impaired; *Coleman v. Stearns Mfg. Co.* 38 Mich. 30, holding that an injunction would lie to prevent the removal of machinery which had become fixtures; *Coker v. Whitlock*, 54 Ala. 180; *Williams v. Chicago Exhibit Co.* 86 Ill. App. 167; *Moriarty v. Ashworth*, 43 Minn. 1, 19 Am. St. Rep. 203, 44 N. W. 531,—holding that the mortgagor in possession would not be restrained from committing waste unless he threatens to impair the security; *Beaver Flume & Lumber Co. v. Eccles*, 43 Or. 400, 99 Am. St. Rep. 759, 73 Pac. 201; *Fairbank v. Cudworth*, 33 Wis. 358,—holding that mortgagee is entitled to an injunction to restrain a mortgagor in possession from committing waste which will impair the security.

Cited in note in 9 Eng. Rul. Cas. 511, 512, on right to enjoin mortgagor in possession from committing waste.

Distinguished in *Tomlinson v. Thompson*, 27 Kan. 70, holding that no action would lie against the purchaser of a house, after it had been removed from the mortgaged premises, and after an action to foreclose had been commenced, if the purchase was made in good faith, though with knowledge of the mortgage; *Gordon v. Johnston*, 14 Grant, Ch. (U. C.) 402, holding that an injunction would lie to restrain the removal of a saw mill from the mortgaged premises, where it would change the character of them though not impair the security.

—Removal of fixtures.

Cited in *Anderson v. Englehart*, 18 Wyo. 409, 108 Pac. 977, holding that removal of fixtures that would impair security of mortgage may be restrained by mortgagee.

—To restrain removal of trees.

Cited in *Moses Bros. v. Johnson*, 88 Ala. 517, 16 Am. St. Rep. 58, 7 So. 146; *Van Wyck v. Alliger*, 6 Barb. 507,—holding that a court will not restrain the purchaser of land under an executory contract of sale, from cutting the timber, unless the security for the purchase price is impaired; *McLeod v. Avery*, 16 Ont. Rep. 365, on the right of the first mortgagee to an accounting for timber removed, where it impairs the value of the security; *Russ v. Mills*, 7 Grant, Ch. (U. C.) 145, holding that an injunction would lie to restrain the removal of trees where it does not appear that the land alone would be a sufficient security; *Harper v. Alpin*, 54 L. T. N. S. 383, holding that an injunction would be issued to prevent the cutting of timber when it would impair the value of the security.

Remedy of mortgagee where security is insufficient.

Cited in *Sun Life Assur. Co. v. Elliott*, 31 Can. S. C. 91 (dissenting opinion), on the right of a mortgagee, where security is insufficient, to recover same from estate of decedent.

—Where trees are severed.

Cited in *Mann v. English*, 38 U. C. Q. B. 240, holding that an action in trover would lie for timber wrongfully cut by the mortgagor where it impaired the value of the security.

18 E. R. C. 104, *WHITBREAD v. SMITH*, 3 DeG. M. & G. 727, 2 Eq. Rep. 377, 18 Jur. 475, 23 L. J. Ch. N. S. 611, 2 Week. Rep. 177.

Costs in action to redeem mortgage.

Cited in *Winters v. McKinstry*, 14 Manitoba L. Rep. 294, holding that in redeeming the party was entitled to the costs occasioned by the resisting of the claim to redeem, to be set off against the mortgage money and costs allowed.

Liability of life tenant for interest.

Cited in note in 18 Eng. Rul. Cas. 165, on remainderman's right to compel life tenant to keep down interest on mortgage.

Cited in 2 Beach, Trusts, 1435, on liability of life tenant for interest on valuation of annuity.

Duty of trustee to pay debts and charges.

Cited in 2 Beach, Trusts, 1145, on duty of trustee to pay debts and charges.

18 E. R. C. 116, *BROWN v. COLE*, 9 Jur. 290, 14 L. J. Ch. N. S. 167, 14 Sim. 427.

Immature equities.

Cited in *Allan v. Brown*, 4 Grant. Ch. (U. S.) 439, on the right of the purchaser of real estate to compel specific performance before the contract is to be completed.

Right of mortgagor to redeem before maturity of mortgage.

Cited in *Bernard v. Toplitz*, 160 Mass. 162, 39 Am. St. Rep. 465, 35 N. E. 373, holding that a bill in equity to redeem a mortgage before the date it is due, cannot be maintained although the same was due at the time of the hearing; *Re Hofmann*, 14 W. N. C. 563, on the right of the mortgagor to compel the mortgagee to accept the amount of the money before it is due; *Pyross v. Fraser*, 82 S. C. 498, 23 L.R.A.(N.S.) 403, 129 Am. St. Rep. 901, 64 S. E. 407, 17 Ann. Cas. 150, holding that tender of amount due on mortgage before maturity is not legal tender; *Gibson v. Nelson*, 2 Ont. L. Rep. 501, on the right of the mortgagor to redeem before the maturity of the mortgage; *Chicago & I. R. Co. v. Pyne*, 30 Fed. 86, on the right to pay railroad bonds before their maturity; *Bradburn v. Edinburgh Life Assur. Co.* 5 Ont. L. Rep. 657, on the right to redeem before the maturity of the mortgage, under statute providing for same; *Sheldon v. Chisholm*, 3 Grant, Ch. (U. C.) 655, on the enforcement of the equity of redemption.

Distinguished in *Angevine v. Smith*, 26 N. S. 44, holding where the deed provided that there should be a reconveyance if the money was paid within the year, that the mortgagor could pay at any time within the year; *Bovill v. Endle* [1896] 1 Ch. 648, 65 L. J. Ch. N. S. 542, 44 Week. Rep. 523, holding that if the mortgagee takes possession or other steps to enforce his debt, the mortgagor may compel him to accept the money.

Effect of unaccepted tender on lien of mortgage or pledge.

Cited in note in 33 L.R.A. 231, on effect of unaccepted tender on lien of mortgage or pledge.

18 E. R. C. 119, *SMITH v. SMITH* [1891] 3 Ch. 550, 60 L. J. Ch. N. S. 694, 65 L. T. N. S. 334, 40 Week. Rep. 32.

Right of mortgagor to pay mortgage before maturity without six months' notice to mortgagee.

Cited in *Bovill v. Endle* [1896] 1 Ch. 648, 65 L. J. Ch. N. S. 542, 44 Week. Rep. 523, holding that the mortgagee, who has taken steps to foreclose or enforce

his mortgage cannot refuse tender of payment of it, on the ground that he is entitled to six months' notice, and interest.

Distinguished in *Fitzgerald v. Mellersh* [1892] 1 Ch. 385, 61 L. J. Ch. N. S. 231, 66 L. T. N. S. 178, 40 Week. Rep. 251, holding that an equitable mortgagee by deposit of title deeds is not entitled to six months' notice before he is bound to accept a tender of the amount due, nor to interest.

18 E. R. C. 123, *KEECH v. HALL*, 1 Dougl. K. B. 21.

Validity of lease from mortgagor subsequent to mortgage, as against the mortgagee.

Cited in *Western U. Teleg. Co. v. Ann Arbor R. Co.* 33 C. C. A. 113, 61 U. S. App. 741, 90 Fed. 379, holding that leases or contracts made by the mortgagor subsequent to the mortgage are terminated by an entry for breach of conditions of mortgage; *McDermott v. Burke*, 16 Cal. 580, holding that the mortgagor could not make a subsequent lease, which would bind the mortgagee or the purchaser at the foreclosure sale; *Anderson v. Robbins*, 82 Me. 422, 8 L.R.A. 568, 19 Atl. 910, on the right of the mortgagor to lease subsequent to giving mortgage; *Howell v. Schenck*, 24 N. J. L. 89, holding that a lease made by the mortgagor subsequent to his giving the mortgage is of no validity as against the mortgagee.

—Relation of lessee to mortgagee.

Cited in *Stedman v. Gassett*, 18 Vt. 346, holding that a lessee of the mortgagor under a parol lease made after default is a tenant at sufferance of the mortgagee; *Doe ex dem. Taylor v. Peterson*, 3 U. C. Q. B. O. S. 497, on the lessee of the mortgagor as a tenant at sufferance; *Stuart v. Baldwin*, 41 U. C. Q. B. 446, on the character of the estate of the lessee from the mortgagor.

—Redemption by lessee.

Cited in *Bacon v. Bowdorn*, 22 Pick. 401, holding that a tenant for years may redeem; *Everett v. Buchanan*, 2 Dak. 249, 8 N. W. 31; *Hamilton v. Dobbs*, 19 N. J. Eq. 227; *Lockhart v. Ward*, 45 Tex. 227.—on the right of a tenant for years from the mortgagor to redeem; *Canada Permanent Loan & Sav. Soc. v. Macdonnell*, 22 Grant. Ch. (U. C.) 461, holding that tenant stands exactly in situation of mortgagor and may redeem from mortgage.

Cited in 2 Washburn. Real Prop. 6th ed. 153, on who may redeem from mortgage.

—Ejectment by mortgagor and notice to quit.

Cited in *Bartlett v. Hitchcock*, 10 Ill. App. 87, holding that a tenant under a lease executed subsequent to the mortgage may be ejected by the mortgagee or the purchaser at the foreclosure sale.

Distinguished in *Birch v. Wright*, 15 E. R. C. 626, 1 T. R. 378, 1 Revised Rep. 223, holding that a tenant under a lease prior in date to the mortgage is entitled to a notice to quit.

—Rights to rents and profits.

Cited in *Mansony v. United States Bank*, 4 Ala. 735, holding that the mortgagee of land may recover the rents or the possession of the land, from a lessee of the mortgagor; *Wilder v. Houghton*, 1 Pick. 87, holding that a mortgagee cannot recover of the mortgagor or his assignee, the rents and profits accruing after commencement of action of ejectment; *Fitchburg Cotton Mfg. Corp. v. Melven*, 15 Mass. 268, holding that the mortgagee cannot recover rents from the lessee of the mortgagor under a lease subsequent to the mortgage; *Sanderson v. Price*, 21 N. J. L. 637 (dissenting opinion), on the right of the mortgagee to maintain an

action for mesne profits, against a lessee of the mortgagor; *Jones v. Hill*, 64 N. C. 198, holding that the mortgagee in possession, or a lessee under him, may be evicted by the mortgagee at any time without notice; *Atkinson v. Burt*, 1 Aik. (Vt.) 329, on the recovery of mesne profits from a grantee of the mortgagor; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420, holding that a mortgagee is not entitled to the rents and profits before actual possession; *Lambert v. Marsh*, 2 U. C. Q. B. 39, on the right of the mortgagee to distrain for rent under a lease from the mortgagor; *Heath v. Pugh*, 16 E. R. C. 377, L. R. 6 Q. B. Div. 345, 50 L. J. Q. B. N. S. 473, 44 L. T. N. S. 327, 29 Week. Rep. 904, on the right of the mortgagee to recover mesne profits accruing prior to his right to possession.

Distinguished in *Moss v. Gallimore*, 18 E. R. C. 404, 1 Dougl. K. B. 279, holding that the mortgagee after giving notice of the mortgage to the tenant in possession, under a lease prior to the mortgage is entitled to rents due, as well as future rents.

Right of lessee of mortgagor to recover for improvements, after eviction.

Cited in *Witherspoon v. McCalla*, 3 Desauss. Eq. 245, on the right of a purchaser to recover for improvements after eviction on account of defective title.

— To terminate lease by surrender of premises.

Cited in *Allen v. Brown*, 5 Lans. 280, holding that as against mortgage previously given by life tenant surrender to landlord did not terminate lease.

Title of mortgagee of fee.

Cited in *Waters v. Stewart*, 1 Cai. Cas. 47, on the mortgage in fee as a conveyance of the estate to the mortgagee.

— In issues or profits of thing mortgaged.

Cited in *Evans v. Merriken*, 8 Gill & J. 39, on the ownership of the issue of a mortgaged slave; *Boston Bank v. Reed*, 8 Pick. 459, on the liability of the mortgagor in possession for mesne profits; *Waterman v. Mackenzie*, 138 U. S. 252, 34 L. ed. 923, 11 Sup. Ct. Rep. 334, declaring right of the mortgagee of a patent to prevent its infringement.

— Title to growing crops or fixtures.

Cited in *Clary v. Owen*, 15 Gray, 522, on the right of the mortgagee to fixtures erected under contract with the mortgagor; *Samson v. Rose*, 65 N. Y. 411 (dissenting opinion), on the right of a lessee of the mortgagor to the growing crops; *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, holding that a lessee of the mortgagor under a lease subsequent to the mortgage, was not entitled to the growing crops on the premises as against the mortgagee, or the purchaser at the foreclosure sale; *Jarvis v. Edgett*, 6 N. B. 66, on the title to growing trees under the mortgage; *Bloomfield v. Hellyer*, 22 Ont. App. Rep. 232, holding that the purchaser of the growing crop under a mortgage foreclosure sale is entitled to them as against a chattel mortgagee of them, under the tenant of the mortgagor; *McDowall v. Phippen*, 1 Ont. Rep. 143, holding that the purchaser at the foreclosure sale was entitled to take the growing crops.

Cited in 2 *Underhill, Land. & T.* 1325, on rights of purchaser at mortgage foreclosure sale of land to matured, unsevered crops as against tenant.

Distinguished in *Willis v. Moore*, 59 Tex. 628, 46 Am. Rep. 284, holding that under state decisions, the purchaser at a foreclosure sale, does not get title to crops ungathered and remaining on the land at the time of purchase.

Estate of mortgagor in possession.

Cited in *Loring v. Bartlett*, 4 App. D. C. 1, on the character of the estate of the

mortgagor in possession; *White v. Rettenmyer*, 30 Iowa, 268, holding that before entry and foreclosure by mortgagee, mortgagor is owner in law and equity of mortgaged premises; *Tripe v. Marcy*, 39 N. H. 439, on the possession of the mortgagor as adverse to that of the mortgagee, before the latter's determination to assume possession; *Sheaffer's Estate*, 6 Pa. Co. Ct. 147, holding that a mortgage is merely a security for a debt and vests pro estate in the mortgagee for any other purpose; *Coolidge v. Melvin*, 42 N. H. 510; *Wolff v. Farrell*, 3 Brev. 68, 1 Treadway Const. 151,—on the character of the estate of the mortgagor in possession, after default; *Doe ex dem. Munro v. Hanson*, 1 N. B. 375, on the estate of a mortgagor left in possession as an estate at will.

— Rights of grantees or assignees.

Cited in *Talbot's Appeal*, 2 Walk. (Pa.) 67 (affirming 2 Chester Co. Rep. 57), holding that where the grantee of mortgagor is suffered to remain in possession he cannot be required to account for rents and profits; *Mason v. Gray*, 36 Vt. 308, holding that a grantee from the mortgagor took his estate subject to the prior mortgage, and could be ejected after default the same as the mortgagor; *Chapman v. Armistead*, 4 Muf. 382, on the right of the assignee of the mortgagee to maintain action against the mortgagor in possession.

Right of the mortgagee to possession of mortgaged premises.

Cited in *Farris v. Houston*, 74 Ala. 162; *Clark v. Beach*, 6 Conn. 142,—on the right of the mortgagee to the possession of the premises; *Butler v. Doe*, 7 Blackf. 247, holding that the purchaser of the equity of redemption at a sheriff's sale, cannot maintain ejectment against the purchaser from the mortgagee; *Miner v. Stevens*, 1 Cush. 482, holding that the mortgagee is entitled to possession as against the mortgagor or anyone claiming under him; *Miller v. Shackelford*, 4 Dana, 264; *Lathrop v. Cheney*, 29 Neb. 454, 45 N. W. 617,—on the right of the mortgagee to assume possession of the premises; *Fluck v. Repogle*, 13 Pa. 405; *Simmons v. Brown*, 7 R. I. 427, 84 Am. Dec. 569,—holding that the mortgagee was entitled to possession both as against the mortgagor and those claiming under him, by execution or otherwise; *Verree v. Verree*, 2 Brev. 211, holding that the mortgagor in possession holds only by permission of the mortgagee; *Wolff v. Farrell*, 3 Brev. 68, 1 Treadway Const. 151, on the right of the mortgagee to evict the mortgagor; *Dunn v. Miller*, 9 N. S. 347, holding that the mortgagee has a right to enter and take possession of the premises at any time.

Cited in note in 18 Eng. Rul. Cas. 409, 410, on mortgagee's right to possession on default by mortgagor.

— Right of mortgagor in possession to notice to quit.

Cited in *Jackson ex dem. Benton v. Laughead*, 2 Johns. 75 (dissenting opinion), on the right of the mortgagor in possession to a notice to quit; *Ellis v. Paige*, 1 Pick. 43, on the right of a tenant at will to notice to quit; *Dem ex dem. Williams v. Bennett*, 26 N. C. (4 Ired. L.) 122, holding that a mortgagee is entitled to take possession at any time without notice to quit to the mortgagor or those claiming under him.

— Remedy by ejectment.

Cited in *Fales v. Gibbs*, 5 Mason, 462, Fed. Cas. No. 4,621, on the right of the mortgagee to maintain ejectment against the mortgagor in possession; *Rockwell v. Bradley*, 2 Conn. 1; *Wakeman v. Banks*, 2 Conn. 445,—holding that the mortgagee may bring an action of ejectment against the mortgagor in possession without previous demand or notice to quit; *Carroll v. Ballance*, 26 Ill. 9, 79 Am. Dec. 354, holding that a mortgagee may recover in ejectment against the mortgagor or those claiming under him without notice to quit before action

brought; *Doe ex. dem. Brown v. Mace*, 7 Blackf. 2, holding that the mortgagee or his heirs may maintain ejectment against the mortgagor or his lessee without notice of demand.

Estoppel by silence, when duty is to speak.

Cited in *Moon v. Hawks*, 2 Aik. (Vt.) 390, 16 Am. Dec. 725, on estoppel by silence, when person ought to have spoken.

Duty of enquiry into title deeds before buying or leasing lands.

Cited in *Chapman v. Glassell*, 13 Ala. 50, 48 Am. Dec. 41, holding that it is the duty of a purchaser to enquire into the title which he is purchasing; *Wilson v. Wall*, 34 Ala. 288; *Prince v. Prince*, 67 Ala. 565,—on the duty of the purchaser of land to enquire into the character of the title, to protect himself.

First in time, best in right.

Cited in *Adams v. Blodgett*, 2 Woodb. & M. 233, Fed. Cas. No. 46, on the application of the maxim first in time, best in right.

18 E. R. C. 128, *SMITH v. CHICHESTER*, 1 Connor & L. 486, 2 Drury & War. 393, 4 Ir. Eq. Rep. 580.

Renewal of lease as engraftment upon original lease.

Cited in *Hausauer v. Dahlman*, 18 App. Div. 475, 45 N. Y. Supp. 1088, holding that where the lessees subject for their full term, with an option to renew the sublease if the original lease was renewed, where the original lease was renewed subsequent to its expiration, the sublessees were entitled to a renewal.

— Subjection to same mortgage.

Cited in *Cleary v. Kennedy*, 17 Phila. 388, 42 Phila. Leg. Int. 286; *McLean v. Wilkins*, 14 Can. S. C. 22,—on the renewal of a lease as a graft upon the old lease so as to be subject to the mortgage affecting it; *Kelly v. Imperial Loan & Invest. Co.* 11 Ont. App. Rep. 526, holding that whether by assignment or demise a renewal of the lease by the mortgagor is considered as a graft upon the old lease, and subject in equity to the same mortgage; *Building & L. Asso. v. McKenzie*, 24 Ont. App. Rep. 599, holding that where the assignee of a term subject to a mortgage of term and of the rights of renewal and purchase, exercises the right of purchase the mortgage becomes a charge upon the fee, and the purchaser has no lien upon the fee for the purchase money, prior to the mortgage.

Owner of estate as entitled to possession of title deeds.

Cited in *Re Sproule*, 1 Ch. Cham. 396, holding that mortgagee has right to title deeds as against mortgagor; *Newton v. Newton*, L. R. 4 Ch. 143, 38 L. J. Ch. N. S. 145, 19 L. T. N. S. 588, 17 Week. Rep. 238, holding that the court would order the surrender of the title deeds, by one having a mortgage by deposit of title deeds, to one having the equitable title to an estate; *Joyce v. DeMoleyns*, 2 Jones & L. 374, 8 Ir. Eq. Rep. 215, on the right of possession of title deeds; *Re Stannard* [1897] 1 Ir. Ch. 415, holding that whoever has the title to land has a right to all deeds affecting it.

Necessary parties in action to redeem or to foreclose.

Cited in note in 18 Eng. Rul. Cas. 493, on necessity of making all persons interested in mortgage security or in equity of redemption parties to action to redeem or foreclose.

Right of second mortgagee to proceed against property where mortgagor purchases property after sale under prior mortgage.

Cited in *Cleary v. Kennedy*, 16 W. N. C. 313, holding that mortgaged property sold under prior mortgage, and purchased by third person who reconveys to

mortgagor, may be proceeded against by second mortgagee whose mortgage was cut off by foreclosure sale.

Right of mortgagor redeeming to claim costs.

Cited in *McMaster v. Dummer*, 12 Grant, Ch. (U. C.) 193, holding that mortgagor who redeemed was not entitled to claim costs against codefendants occasioned by mortgage of leasehold.

18 E. R. C. 138, *EX PARTE BISDEE*, 4 Jur. 1019, 10 L. J. Bankr. N. S. 9, 1 Mont. D. & DeG. 333.

Equitable charge by deposit of title deeds.

Cited in note in 18 E. R. C. 43, on deposit of title deeds as equitable charge on entire property.

Mortgagor's estate in mortgaged property until foreclosure.

Cited in note in 18 E. R. C. 378, on mortgagor's estate in mortgaged property till foreclosure.

18 E. R. C. 141, *NICHOLLS v. MAYNARD*, 3 Atk. 519.

Validity and effect of provisions for increase of interest or payment of larger sum if payment not promptly made.

Cited in *Stiles v. Jackson*, 1 Blackf. 214 (dissenting opinion), on liability for interest on note payable two years from date where interest was to be paid if note was not paid within 10 days after demand; *Mason v. Callender*, 2 Minn. 350, Gil. 302, 72 Am. Dec. 102, holding that where stipulation is to pay greater sum on default of paying lesser sum, no form of words will change it from penalty to liquidated damages, and it is not recoverable; *Waller v. Long*, 6 Munf. 71, holding that bond for certain sum with interest from date if not punctually paid, cannot be enforced as to such back interest.

Cited in notes in 49 L.R.A. 555, on usury in agreement for interest after maturity; 18 E. R. C. 368, on mortgagee's right to obtain collateral or additional advancement from necessities of mortgagor.

— For reduction in amount or rate of interest or payment of lesser sum if payment is promptly made.

Cited in *Ely v. Witherspoon*, 2 Ala. 131, holding that under agreement to remit interest, if payment of obligation was promptly paid, does not preclude collection of interest if obligation is not paid when due; *Plummer v. M'Kean*, 2 Stew. (Ala.) 423, holding that obligation to pay sum of money, which may be discharged by payment of lesser sum, is to be considered as penal obligation, and lesser sum only is recoverable, except where payment is to be made at distant place; *Craig v. Morton*, Hardin (Ky.) 299, holding that bond for \$800 to pay \$400, on particular day, and containing an indorsement that might be discharged by \$325 at earlier day is good bond for payment of \$400, if payment is not made as stipulated in indorsement; *Smith v. Crane*, 33 Minn. 144, 53 Am. Rep. 20, 22 N. W. 633, holding that note providing for payment of interest at ten per cent from date until paid, seven if paid when due, in legal effect calls for interest at 7 per cent from date until paid.

Necessity that lessee having right to purchase before expiration of term make payment promptly.

Cited in *Steele v. Bond*, 32 Minn. 14, 18 N. W. 830, holding that where lease contained stipulation granting to lessee right to purchase before expiration of

term by payment of certain sum, payment of such sum was essential to make binding contract.

Rate of interest on contracts.

Cited in *Bryan v. Moore*, Minor (Ala.) 377, holding that act of 1818, does not change rate of interest on contracts made before its enactment.

18 E. R. C. 144, *DANIELL v. SINCLAIR*, L. R. 6 App. Cas. 181, 50 L. J. C. P. N. S. 50, 44 L. T. N. S. 257, 29 Week. Rep. 569.

Implied agreement by payment of interest at certain rate.

Cited in *Murchie v. Theriault*, 1 N. B. Eq. 588, holding that the payment of interest at a rate larger than that specified in the mortgage does not raise an agreement to continue to pay it at such rate.

Distinguished in *Jackson v. Richardson*, 1 N. B. Eq. Rep. 325, holding that where by indorsements upon the mortgage, the mortgagor agreed to pay compound interest it became a charge upon the land, but not so as to the acknowledgments in the bond; *Thomson v. O'Toole*, 21 N. S. 1, holding that there can be no compound interest unless there is a specific agreement to that effect, and an agreement to pay on account including compound interest does not make an agreement to pay it in the future.

Mortgagee's right to obtain collateral or additional advancement from necessities of mortgagor.

Cited in note in 18 Eng. Rul. Cas. 369, on mortgagee's right to obtain collateral or additional advancement from necessities of mortgagor.

Right to open a settled mortgage account.

Cited in *Griffith v. Crocker*, 18 Ont. App. Rep. 370, on the right to open a settled mortgage account.

Cited in notes in 23 L.R.A.(N.S.) 790, on conclusiveness of stated or settled account containing inaccuracy or error in method of mathematical calculation: 1 Eng. Rul. Cas. 444, 445, on conclusiveness of settled accounts.

Relief in equity against a mistake of law.

Cited in *Gould v. Emerson*, 160 Mass. 438, 39 Am. St. Rep. 501, 35 N. E. 1065, holding that equity will grant relief against the mutual mistake of the partners in settling a partnership account; *Wallbridge v. Gaujot*, 14 Ont. App. Rep. 460, on the relief by equity against a mistake in law.

Cited in note in 28 L.R.A.(N.S.) 808, 838, on relief from mistake of law as to effect of instrument.

Recovery of money paid by mistake.

Cited in note in 21 Eng. Rul. Cas. 79, on recovery back of money paid by mistake.

Cited in 4 Dillon, Mun. Corp. 5th ed. 2834, on nonrecoverability back of voluntary payments to municipal corporations without mistake or fraud.

18 E. R. C. 156, *ARNOT v. BISCOE*, 1 Ves. Sr. 95.

Fraudulent silence or concealment as to title or lien.

Cited in *Merrett v. Robinson*, 35 Ark. 483, holding that if a vendor sells goods which he knows to be mortgaged, without informing the purchaser, the sale is fraudulent; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538, holding that if a prior encumbrancer sees another conveyance or encumbrance, knowing its contents, and does not disclose his own encumbrance, but intentionally allows the other to remain in ignorance, he will be postponed to the subsequent en-

cumbrancer; *Engle v. Burns*, 5 Call (Va.) 463, 2 Am. Dec. 593, holding that if the owner of land sees it sold to another person, without disclosing his title he forfeits his rights.

Cited in note in 33 L. ed. U. S. 385, on duty to disclose fraud.

Cited in 5 Thompson, Neg. 1077, on liability of attorney for negligence in advice as to titles.

Right of vendor of incumbered lands.

Cited in *Christian v. Cabell*, 22 Gratt. 82, on the right of the vendor of an estate to time in which to clear up incumbrances.

Personal liability of agent for fraud practiced upon third person.

Cited in *Reed v. Peterson*, 91 Ill. 288, holding that an agent was liable personally for his fraud practiced upon another in the purchase of land.

Cited in note in 50 L.R.A. 647, on liability of servant or agent for conversion, trespass or other positive tort against third parties under orders.

Cited in *Walker's Real Estate Agency*, 215, on fraud of broker against third person; *Tiffany*, Ag. 382, on liability of agent to third persons for misfeasance.

Obligation of solicitor not to reveal confidential communications.

Cited in *Chase's Case*, 1 Bland, Ch. 206, 17 Am. Dec. 277, holding that a solicitor is not permitted to reveal the confidential communications made to him by his client.

Bill with one witness, where denied by answer.

Cited in *Kinsey v. Grimes*, 7 Blackf. 290; *Swift v. Dean*, 6 Johns. 523,—on the right to a decree in equity where there is but one witness to the bill, and the answer explicitly denies its allegations.

Answer as evidence.

Cited in *White v. Walker*, 5 Fla. 478; *Dodge v. Griswold*, 12 N. H. 573,—holding that answer of defendant to bill upon any matter in issue, is evidence in his favor.

Impeachment of denial in answer.

Cited in *Wetmore v. White*, 2 Cal. Cas. 87, 2 Am. Dec. 323, holding that denial in answer may be impeached by testimony of several witnesses.

Relief in equity by compensation in damages.

Cited in *Woodman v. Freeman*, 25 Me. 531, on the right of a court of equity to give relief by compensation in damages, where the facts do not authorize any other relief.

18 E. R. C. 160, *DIXON v. PEACOCK*, 3 Drew. 288.

Right of tenant to allowance by remainderman of claim for improvements.

Cited in *Knapp v. Bower*, 17 Grant. Ch. (U. C.) 695, holding that tenant for life cannot claim to be allowed by remainderman for improvements.

18 E. R. C. 166, *JAMES v. BIOU*, 19 Revised Rep. 200, 3 Swanst. 234.

Right to redeem from mortgage.

Cited in *Forster v. Ivey*, 2 Ont. L. Rep. 480, on the right to redeem after sale of equity of redemption; *Nichol v. Allenby*, 17 Ont. Rep. 275, holding that where an undivided interest in land is mortgaged, the co-owner has no right to redeem.

Distinguished in *Pearce v. Morris*, 39 L. J. Ch. N. S. 342, L. R. 5 Ch. 227, 22 L. T. N. S. 190, 19 Week. Rep. 196—varying 38 L. J. Ch. N. S. 566, L. R. 8 Eq. 217, 21 L. T. N. S. 287, 17 Week. Rep. 1001, holding that a mortgagee is

not bound to convey the legal estate in the mortgaged property to a person from whom he has accepted payment of principal and interest and costs, if that person has only contracted to purchase a part of the mortgaged estate, and has not accepted the title.

Hearing of exceptions to sufficiency of the answer on motion to dissolve injunction.

Cited in *Jones v. Magill*, 1 Bland, Ch. 177, holding that the exceptions to the sufficiency of the answer and the motion to dissolve the injunction may be taken up at the same time.

18 E. R. C. 177, *ANCASTER v. MAYER*, 1 Bro. Ch. 454.

Right of devisee of lands subject to a mortgage to have them exonerated out of personal estate.

Cited in *Richardson v. Hall*, 124 Mass. 228, holding that as a general rule land specifically devised is to be exonerated from all mortgages upon it, unless a contrary intention is expressed; *Mansell's Estate*, 1 Pars. Sel. Eq. Cas. 367, holding that a devisee of lands subject to a mortgage is entitled to have them exonerated therefrom out of the personal estate, unless the will shows an intention otherwise.

Cited in 2 Washburn Real Prop. 6th ed. 177, on devisee of real estate as an heir.

Distinguished in *Hewes v. Dehon*, 3 Gray, 205, holding that under a will devising the real estate to the wife for life and remainder to the children, the mortgagee of the real estate is entitled to payment out of the personal estate or to resort to the real estate; *Cumberland v. Codrington*, 3 Johns. Ch. 229, 8 Am. Dec. 492, holding that where a person takes a conveyance of land subject to a mortgage, covenanting to indemnify the grantor against the mortgage, and having paid off part of the encumbrance, dies intestate, the heir cannot throw the charge upon the personal representative.

Liability of purchaser of land subject to mortgage.

Cited in *Canavan v. Meek*, 2 Ont. Rep. 636, holding that unless there is covenant to pay prior mortgage purchaser is only bound to protect land and indemnify his grantor if he is liable personally for deficiency.

Charges upon land.

Cited in *Kelsey v. Deyo*, 3 Cow. 133, holding that where such appears from the whole will to have been the intention of the testator, the legacy should be a charge on the land devised, although the land was not expressly charged with its payment; *Davidson v. Gurd*, 15 Ont. Pr. Rep. 31, on liability of equity of redemption for debts of deceased mortgagor in favor of legacies.

Cited in 2 Beach Trusts, 1322, on claims of creditors as a charge on realty.

Liability of mortgaged property for advances made by factor.

Cited in *Schiffer v. Feagin*, 51 Ala. 335, on liability of mortgaged property for advances made by factor as against right to redemption from mortgage.

Personal estate of decedent as primary fund for payment of debts.

Cited in *Re Woodworth*, 31 Cal. 595; *Cooch v. Cooch*, 5 Houst. (Del.) 540, 1 Am. St. Rep. 161,—holding that the personal estate is primarily liable for the debts of the decedent; *Addison v. Addison*, 44 Md. 182; *Hancock v. Minot*, 8 Pick. 29,—on the personal estate as being subject primarily to the debts of the deceased; *Livingston v. Newkirk*, 3 Johns. Ch. 312; *Hoes v. Van Hoesen*, 1 N. Y. 120; *Morrow v. Morrow*, 2 Tenn. Ch. 549,—holding that the personal estate of

the decedent is the primary fund for the payment of debts, unless changed by an express provision in the will; *Higbie v. Morris*, 53 N. J. Eq. 173, 32 Atl. 372, holding that where testatrix devised to her granddaughter all her right, title, and interest in certain land being then subject to mortgage securing two bonds of testatrix, personal property was not discharged from payment of bonds; *O'Conner v. O'Conner*, 88 Tenn. 76, 7 L.R.A. 33, 12 S. W. 447; *State ex rel. Pate v. Oliver*, 104 N. C. 458, 10 S. E. 709,—holding that personalty was primarily liable for payment of purchase price of tract of land for which deceased became liable under contract to purchase; *Ruston v. Ruston*, 2 Yeates, 54, 1 Am. Dec. 283, holding that personal estate of testator shall first be applied in discharge of his personal debt, unless by express words or manifest intention he exempts it; *Tait v. Northwick*, 25 E. R. C. 782, 4 Ves. Jr. 816, 4 Revised Rep. 358, holding that the personal estate is the natural fund for the payment of debts and can only be exempted by the express provisions of the will.

Cited in 2 *Thomas Estates*, 1344, on charging gifts and debts on property and persons; 1 *Thomas Estates*, 773, on personal liability of trustee for negligent or wrongful act.

—Contrary provision in will.

Cited in *Fenwick v. Chapman*, 9 Pet. 461, 9 L. ed. 193, holding that where by his will the testator directed his slaves to be freed, it amounted to a charge upon land for the payment of debts; *Isenhardt v. Brown*, 1 Edw. Ch. 411, holding that if a will clearly indicates that the personal estate is to be exonerated from debts, the intent will not be disregarded; *Marsh v. Marsh*, 10 B. Mon. 360, holding that if intention to exonerate personalty appear so plainly upon face of whole will as to convince mind of court, that intention should be carried into effect; *Calder v. Curry*, 17 R. I. 610, 24 Atl. 103, holding that where the will gave all the personal estate to the wife for her own absolute use and disposal or if she should die before he did then after the payment of his debts to go to others, it exempted the personal estate as between the widow and devisees; *Dunlap v. Dunlap*, 4 Desauss. Eq. 305, holding that the will having directed that the real estate be subject to debts, released the personal property, though the will was insufficient to pass the real estate; *Warley v. Warley*, Bail. Eq. 397, on the exemption of the personal estate by provision in the will.

Cited in note in 25 E. R. C. 815, on what is necessary to exonerate general personal estate of testator from his debts.

—Where land is also charged or bequest is specific.

Cited in *Whitehead v. Gibbons*, 10 N. J. Eq. 230, holding that the personal estate is the primary fund and it is not relieved by the debts being in express terms made a charge upon the realty; *Re Oosterhoudt*, 15 Misc. 566, 38 N. Y. Supp. 179, 1 *Gibbons Sur. Rep.* 516, holding that personal property is liable for debts although specifically bequeathed; *Hoes v. Van Hoesen*, 1 Barb. Ch. 379, holding that the personal estate is the primary fund for the payment of debts, notwithstanding that the testator has dedicated a portion of the real estate to the payment of debts or legacies, and has specifically disposed of all personal estate.

Construction of wills.

Cited in *Leigh v. Savidge*, 14 N. J. Eq. 124, holding that parol evidence of the amount of the estate is inadmissible to aid the construction of a will; *Wells v. Ritter*, 3 Whart. 208, on the right to refer to the quantum of the estate to aid in the construction of a will; *Ruston v. Ruston*, 2 Yeates, 54, 1 Am. Dec. 283, on the construction of a will by the circumstances within it; *Lockhart v. Ray*,

20 N. B. 129, holding that the quantum of the estate cannot be gone into to affect the construction of the will.

Necessity of personal liability in a mortgage.

Cited in *Russell v. Southard*, 12 How. 139, 13 L. ed. 927, holding that the absence of a personal obligation by the grantor to repay, is not conclusive in determining the character of the instrument as a deed or mortgage; *Demond v. Crary*, 9 Fed. 750, on the covenant to pay as necessary to sustain action on the mortgage; *Brown v. Dewey*, 1 Sandf. Ch. 70, on the absence of personal liability of the grantor as determining whether an absolute conveyance is a deed or mortgage.

18 E. R. C. 193, *HUNTINGDON v. HUNTINGDON*, 2 Bro. P. C. 1.

Wife as surety for husband under a mortgage of her estate to secure his debt.

Referred to as a leading case in *Shea v. McMahon*, 16 App. D. C. 65, holding that a wife who has mortgaged her property for her husband's debt, is surety merely and is entitled to exoneration of her estate and reimbursement from her husband's estate.

Cited in *Whitman v. Winchester*, 15 Gray, 453, holding that widow who has joined with husband in mortgage of her separate estate to secure his debt, which she has since paid, may prove amount before commissioners of insolvency upon his estate; *Hanford v. Bockee*, 20 N. J. Eq. 101, holding that where the wife's property is mortgaged to secure the husband's debt, she will be a mere surety for him and entitled to payment out of his estate; *Neimcewicz v. Gahn*, 3 Paige, 614; *Darby v. Freedman's Sav. & Trust Co.* 3 MacArth. 349,—holding that a married woman who mortgages her separate estate for the debt of her husband acquires the rights and privileges of a surety; *Lancaster Bank v. Hogen-dobler*, 3 Clark (Pa.) 36, holding that the wife who mortgages her land to secure the debt of the husband is always postponed to other creditors of the husband, but not as against his heirs and legatees; *Lightfoot v. Bass*, 2 Tenn. Ch. 677, holding that a mortgage by the wife to secure the husband's debt is not a sale, but the wife is the surety for the husband; *Filler v. Tyler*, 91 Va. 458, 18 S. E. 869; *Wofford v. Unger*, 55 Tex. 480,—holding that married woman who gives mortgage on her land to secure husband's debt, will be treated as surety or guarantor.

—Where wife joins in mortgage of husband's estate.

Cited in *Gemmill v. Nelligan*, 26 Ont. Rep. 307, holding that where lands mortgaged to secure loan have been sold by mortgagee, wife of mortgagor, who joined in mortgage is entitled to dower out of surplus.

Right of widow joining in mortgage to redeem.

Cited in *Robertson v. Robertson*, 25 Grant, Ch. (U. C.) 486, holding that widow who joined in mortgage has right to redeem.

Cited in note in 18 E. R. C. 116, on presumption of right of redemption remaining in original owner notwithstanding limitations to other persons.

18 E. R. C. 198, *ALDRICH v. COOPER*, 7 Revised Rep. 86, 8 Ves. Jr. 382.

Marshalling of assets.

Cited in *Merrill v. National Bank*, 173 U. S. 131, 43 L. ed. 640, 19 Sup. Ct. Rep. 360, holding that in marshalling assets as respects creditors, no part of his security can be taken from secured creditor until he is completely satisfied;

Dickson v. Back, 32 Or. 217, 51 Pac. 727, holding that principle of marshalling securities has no application to remedy against surety so long as principal has property out of which judgment for payment of which surety is liable can be satisfied; *Barton Nat. Bank v. Atkins*, 72 Vt. 33, 47 Atl. 176, holding that equity requires creditors to resort to primary debtor's assets first and to exhaust them before resorting to liability of stockholders; *McClaskey v. O'Brien*, 16 W. Va. 791, holding that where land subject to lien of mortgage is sold in parcels successively to different persons, buyers are *prima facie* chargeable in inverse order of alienation.

Cited in *Benjamin Sales* 5th ed. 920, on marshalling of assets in equity.

—In case of double security.

Cited in *Scruggs v. Memphis & C. R. Co.* (*Matthews v. Memphis & C. R. Co.*) 108 U. S. 368, 27 L. ed. 756, 2 Sup. Ct. Rep. 780, holding that where there were two funds in possession of the court out of which the two liens were payable, the one not covered by both would be used to pay the subsequent lien; *Chapman v. Hamilton*, 19 Ala. 121, on the right of a creditor having two securities to elect against which he will proceed; *Morton v. Grafflin*, 68 Md. 545, 13 Atl. 341; *State Bank v. Roche*, 35 Fla. 357, 17 So. 652,—holding that creditors favored by having two securities to look for payment cannot be compelled to resort to property, though pledged to pay his debt that belongs to another than common debtor; *Webb v. Hunt*, 2 Ind. Terr. 612, 53 S. W. 437; *Core v. Ontario Loan & Debenture Co.* 9 Ont. Rep. 236,—holding that marshalling of estates is not enforced to prejudice of third parties; *Ross v. Duggan*, 5 Colo. 85; *Clark v. Manufacturers' Mut. F. Ins. Co.* 130 Ind. 332, 30 N. E. 212; *Willey v. St. Charles Hotel Co.* 52 La. Ann. 1581, 28 So. 182,—holding that a creditor having two funds amenable to his debt is not permitted by his election to disappoint the party having only one fund; *Post v. Mackall*, 3 Bland, Ch. 486, holding that where there is a double fund the party shall not operate his payment so as to disappoint another claim; *Brady v. Dilley*, 27 Md. 570; *Gilliam v. McCormack*, 85 Tenn. 597, 4 S. W. 521,—holding that right in equity to marshal assets will not be enforced to prejudice of either dominant creditor or third persons or so as to do injustice to debtor; *Keaton v. Miller*, 38 Miss. 630, holding that if one creditor has a lien on two funds and another upon only one of them, the latter can compel the former to seek satisfaction out of the unincumbered fund before resorting to the other, unless the former would be thereby prejudiced; *Dunlap v. Dunseth*, 81 Mo. App. 17, holding that one having a lien on two funds, one of which is subject to a junior incumbrance should resort to the unincumbered fund, first; *Lee v. Gregory*, 12 Neb. 282, 11 N. W. 297, holding that only the creditor of a common debtor can compel a creditor having two or more liens while the plaintiff has but one to exhaust the fund not covered by the plaintiff's lien before resorting to the other; *Alston v. Munford*, 1 Brock. 266, Fed. Cas. No. 267; *Wiggin v. Dorr*, 3 Sumn. 410, Fed. Cas. No. 17,625; *Gould v. Central Trust Co.* 6 Abb. N. C. 381,—on the principles of marshalling assets and subrogation; *Midgely v. Slocomb*, 2 Abb. Pr. N. S. 275, 32 How. Pr. 423, on the right of a person holding two securities to proceed against both until his debt is paid; *Gould's Estate*, 6 W. N. C. 562, holding that the election of a creditor having a claim upon two funds would be controlled in favor of one having a claim upon one only; *Mowry v. Davenport*, 6 Lea, 80, holding that the rights of a creditor with two funds will not be prejudiced by the marshalling of assets, or delay him in collecting his debt; *Gilliam v. McCormack*, 85 Tenn. 597, 4 S. W. 521, on the marshalling of securities; *Sanders v. Godley*, 36 Ala. 50; *Bryant v. Stephens*, 58 Ala. 636;

Gusdorf v. Ikelheimer, 75 Ala. 148; Nelson v. Dunn, 15 Ala. 501; Mack v. Shafer, 135 Cal. 113, 67 Pac. 40; Hannegan v. Hannah, 7 Blackf. 353; Bearse v. Lebowick, 212 Mass. 344, 99 N. E. 175; United States Ins. Co. v. Shriver, 3 Md. Ch. 381; Benedict v. Benedict, 15 N. J. Eq. 150; Sternberger v. Sussman, 69 N. J. Eq. 199, 60 Atl. 195; Cowden's Estate, 1 Pa. St. 267; Barr Pumping Engine Co. 13 Pa. Dist. R. 121; Selinger v. Myers, 24 Pa. Co. Ct. 71, 31 Pittsb. L. J. N. S. 62; Bank of Hamburg v. Howard, 1 Strobh. Eq. 173; Ball v. Setzer, 33 W. Va. 444, 10 S. E. 798; Offutt v. McCrum, 38 W. Va. 583, 18 S. E. 757; Hudkins v. Ward, 30 W. Va. 204, 8 Am. St. Rep. 22, 3 S. E. 600; Conrad v. Harrison, 3 Leigh, 532; Re McKay, 5 N. S. 131; Huntingdon v. Van Brocklin, 8 Grant, Ch. (U. C.) 421; Joseph v. Heaton, 5 Grant, Ch. (U. C.) 636; Tennent v. Patton, 6 Leigh, 196,—holding that where one claimant has two funds to resort to and another only one, the first shall resort to that on which the second has no lien; Goss v. Lester, 1 Wis. 43, holding that where one has a lien upon two funds and another upon one of them, equity will require the first to seek his satisfaction so far as it goes, out of the fund on which he alone has a lien; Rully v. Mayer, 12 N. J. Eq. 55, holding same, but only where no prejudice will result to the creditor or third persons; Jervis v. Smith, 7 Abb. Pr. N. S. 217, 1 Sheldon (N. Y.) 189, holding that securities are never marshalled when it will operate to prejudice of double fund creditor; Re Hamilton, 10 Manitoba L. Rep. 583, holding that one who has demand against two persons, creditors of one have no right to compel payment from certain one if not founded upon some equity; Topping v. Joseph, 1 U. C. Err. & App. 292 [reversing 5 Grant Ch. (U. C.) 636], on the right to a creditor, having resort to only one fund, to payment out of another, where the former fund was taken by a creditor having access to both.

Distinguished in Carter v. Neal, 24 Ga. 346, 71 Am. Dec. 136, holding that the doctrine of two funds applies only to cases where contending creditors have a common debtor.

—In case of mortgages or liens.

Cited in Mack v. Shafer, 135 Cal. 113, 67 Pac. 40, holding that where the one party has a lease of a part of a piece of land covered by a mortgage he can compel the mortgagee to see the part not leased, first, to satisfy the mortgage; Looney v. Quill, 3 Mackey, 51, holding that where different parcels of land, all subject to common incumbrance, are conveyed to successive purchasers at different dates, proceeds of land must be applied in inverse order of alienation to satisfy first incumbrance; First Nat. Bank v. Taylor, 69 Kan. 28, 76 Pac. 425, on the rights of junior and senior mortgagees; Watson v. Bane, 7 Md. 117, holding that where the judgment creditor has a lien upon all the property of the person and another has a mortgage upon part, the former must look first to those not included in the mortgage; Jackson v. Condict, 57 N. J. Eq. 526, 41 Atl. 374, holding that doctrine of marshalling portions of lands in discharge of mortgage in inverse order of their alienation does not apply where alienations were not made by deeds of general warranty, and were given for nominal consideration; Walker v. Covar, 2 S. C. 16; Detroit Sav. Bank v. Truesdall, 38 Mich. 430,—holding that doctrine of marshalling assets must not be applied to mortgagee's injury; its purpose is to protect later interests; Latimer v. Ballew, 41 S. C. 517, 44 Am. St. Rep. 748, 19 S. E. 792, holding that judgment creditor may enforce payment by sale of any property on which his judgment is lien; Whitten v. Saunders, 75 Va. 563, holding that lands will be liable in inverse order of alienations from debtor, although one of alienees is purchaser from son of debtor, who held under voluntary conveyance from debtor; Lyman v. Lyman, 32 Vt.

79, 76 Am. Dec. 151, holding that purchasers of land subject to common burden, must contribute in inverse order of alienation; *Curry v. Hale*, 15 W. Va. 867, holding that vendor is entitled to exoneration at expense of land where incumbrance is to be deducted from purchase price.

Cited in note in 18 E. R. C. 213, on marshalling assets of mortgagor.

Distinguished in *Osborn v. Carr*, 12 Conn. 195, holding that the principle that where a mortgagee has a lien on two separate estates, one of which is subject to a subsequent mortgage, he must first satisfy himself from the unincumbered does not apply where the rights of third parties will be impaired.

— **Real and personal estate of deceased debtor.**

Cited in *Cooch v. Cooch*, 5 Houst. (Del.) 540, 1 Am. St. Rep. 161, holding that specific bequest of personal estate, without charge on lands for payment of debts, will not exonerate personalty; *Root's Estate*, 10 Pa. Dist. R. 712, holding that the personal estate is prima facie the exclusive fund for payment of legacies, and on implication in the will to charge the land must be clear; *Duvall's Estate*, 146 Pa. 176, 23 Atl. 231, holding that where one dies without leaving sufficient personal estate for the payment of his bequests they are deemed wholly or pro tanto unless there is something more than the mere gift of the bequest to denote an intention that it should be paid out of land; *Alexander v. Miller*, 7 Heisk. 65, holding that personalty, being specifically bequeathed, was exonerated from primary liability for debts after exhaustion of money, and that undivided reversion should be resorted to; *Re McKay*, 5 N. S. 131, on the liability of the real estate of the testator for the payment of legacies.

— **In case of legatees.**

Cited in *Lightfoot v. Lightfoot*, 27 Ala. 351, holding that descended lands are liable for the excess of debts after provision made by the testator is exhausted, before general pecuniary legacies or other specific legacies; *Sanders v. Godley*, 36 Ala. 50; *McCullom v. Chidester*, 63 Ill. 477,—holding that where there is a bequest of personalty and realty remains of which there is no devise creditors of the estate must resort to such realty; *Blakeslee v. Pardee*, 76 Conn. 263, 56 Atl. 503, holding that where testator has charged one or more legacies upon real estate, and other legacies are not so charged, if personal estate proves insufficient to pay them all, legacies charged on land shall be paid thereout; *Powhatan S. B. Co. v. Potomac S. B. Co.* 23 Md. 238, holding that where the creditor was paid out of the personal estate, which had been bequeathed to the widow in lien of dower, she was entitled to have the amount made up out of the real estate on which he had his lien; *Skidmore v. Romaine*, 2 Bradf. 122, on the right of the legatees to have the assets marshalled against the devisees; *Rice v. Harbeson*, 63 N. Y. 493, holding that doctrine of marshalling assets is applicable to the claims of legatees and other creditors; *McGlaughin v. McGlaughin*, 24 Pa. 200, on the satisfaction of a specific legacy out of a residuary one; *Brown v. James*, 3 Strobb. Eq. 24, holding that descended real property shall be resorted to for the payment of debts before personal property specifically bequeathed; *Elliott v. Carter*, 9 Gratt. 541, holding that where the personal property was insufficient to pay the debts and legacies, where the real estate was specifically charged with the payment of debts, the legatees were entitled to resort to the real estate to the amount of personalty taken to pay debts; *Clarke v. Buck*, 1 Leigh, 487, holding that where the personal estate and a legacy were specifically given to a legatee and no devise made of the realty.

the latter was charged with the testator's debts, and the legatee entitled to payment out of the realty where personalty was taken to pay debts.

Annotation to leading cases in equity is cited in *Maybury v. Grady*, 67 Ala. 147, on the marshalling of assets to pay general and specific legacies.

Liability of grantee assuming mortgage.

Cited in *Coudert v. Coudert*, 43 N. J. Eq. 407, 5 Atl. 722, holding that assumption of mortgage does not discharge land from its primary liability for payment of debt; *Canavan v. Meek*, 2 Ont. Rep. 636, holding that where deed is taken subject to mortgage purchaser does not undertake to pay debt; *Frontenac Loan & Invest. Soc. v. Hysop*, 21 Ont. Rep. 577, holding that where one purchases an estate subject to a mortgage, and gets only an equity of redemption, his covenant to pay the mortgage money and indemnify the mortgagee does not constitute a debt as between him and the mortgagee; *Ré Cozier*, 24 Grant, Ch. (U. C.) 537, holding that acceptance of deed reciting that property is conveyed subject to mortgage implies agreement to indemnify grantor, but does not enure as undertaking to pay debt, unless amount is part of consideration.

Liability of grantee where grantor pays mortgage and retains part of land.

Cited in *Pierce v. Canavan*, 28 Grant, Ch. (U. C.) 356, holding that where by agreement between vendor and vendee paramount mortgage is paid by grantor, and grantor retains in his hands portion of land mortgaged, mortgage is primarily cast upon such land.

Right of grantee of portion of mortgaged premises to redeem.

Cited in *Howser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206, holding that grantee in warranty deed of portion of mortgaged premises has right to redeem from under mortgage before foreclosure sale.

Contribution to payment of mortgage in proportion to value of the property.

Cited in *Bates v. Ruddick*, 2 Iowa, 423, 65 Am. Dec. 774, holding that where the mortgagor sold his land to several persons, the latter were liable only for their proportionate share of the mortgage debt in proportion to the value of their shares.

Effect of registry acts upon rights of mortgagee.

Cited in *Cogswell v. Stout*, 32 N. J. Eq. 240; *Lynchburg Perpetual Bldg. & L. Co. v. Fellers*, 96 Va. 337, 70 Am. St. Rep. '851, 31 S. E. 505,—holding that registry acts are not intended to affect antecedent rights, but only such persons as are compelled to search records for protection of their interests.

Doctrine of subrogation.

Cited in *Pritchett v. Jones*, 87 Ala. 317, 6 So. 75, holding that right of subrogation will not be enforced to affect prejudicially, rights of third persons; *Johnson v. Young*, 20 W. Va. 614; *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468; *Rixey v. Pearre Bros.* 89 Va. 113, 15 S. E. 498; *Sherman v. Shaver*, 75 Va. 1; *Matthews v. Fidelity Title & T. Co.* 52 Fed. 687,—holding that doctrine of subrogation is not founded on contract, nor does it depend on strict suretyship but results from natural justice, placing burden where it ought to rest; *Gulf, C. & S. F. R. Co. v. Locker*, 77 Tex. 279, 14 S. W. 611, holding that right of subrogation does not exist when payment is made without legal obligation, and without being required for preservation of some right in property of party paying.

—**Subrogation of creditors or claimant to the assets or rights open to other creditors.**

Referred to as a leading case in *Taylor's Estate*, 7 Pa. Dist. R. 305, 15 Lane. L. Rev. 341, holding that where a portion of the personal property was applied to the payment of a bond and mortgage upon the real estate, the general creditors would be subrogated to the rights of the mortgage creditor in the land, where the estate was insolvent.

Cited in *The Tangier*, 2 Low. Dec. 7, Fed. Cas. No. 13,744, holding that one who advances money to enable master of foreign vessel arriving here to pay custom charges and wages of his crew, has privilege against vessel for those advances; *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88, 6 S. W. 897, holding that where two persons purchase tract of land, and give joint note for purchase money secured by lien on land, one of whom is compelled to pay whole amount of note, will be subrogated to vendor's security; *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494, holding that if a creditor has a lien upon two different parcels of land, and another a subsequent lien on only one, and the prior lien is paid out of the one held by both, the subsequent creditor may be subrogated to the rights of the prior creditors; *Kymer v. Kymer*, 6 Watts, 221; *State Sav. Bank v. Harbin*, 18 S. C. 425 (dissenting opinion),—on the subrogation of a creditor having resort to only one fund to rights of the creditor having resort to several; *Clark v. Wright*, 24 S. C. 526, holding that preferred creditor may be compelled to place his remedies at disposition of other claimant, after they have satisfied his own debt; *Shultz v. Hansbrough*, 33 Gratt. 567, holding that where purchaser buys subject to incumbrances he becomes principal debtor and subsequent incumbrancer is entitled to stand in vendor's shoes and have his equities administered for his relief; *Moore v. Ligon*, 22 W. Va. 292, holding that if creditor is paid his debt by some person other than his debtor, under mistake of law, it is not duty of creditor to refund, but he has right to proceed against debtor for benefit of person who paid him the debt.

—**Burden of proof.**

Cited in *Bell v. McConkey*, 82 Va. 176, holding that burden is on him who would confine creditor to particular fund or remedy, to show that it affords sure, prompt and adequate means of payment.

Subrogation of surety to rights of the creditor on payment of secured debt.

Referred to as a leading case in *Quay v. Sculthorpe*, 16 Grant, Ch. (U. C.) 449, holding that where a party was a surety for a mortgagee, and was compelled to pay the debt, that he was subrogated to the rights of the mortgagees and his own mortgagees were entitled to the benefits of the first mortgage of which he was surety.

Cited in *Lidderdale v. Robinson*, 12 Wheat. 594, 6 L. ed. 740, holding, following state law, that the joint indorser who has paid more than his proportion of the debt has a right to satisfaction out of the assets of his co-indorser; *Penn v. Ingles*, 82 Va. 65; *Knighton v. Curry*, 62 Ala. 404,—holding that surety who has paid debt of principal, is entitled to stand in place of creditor, as to all securities for debt held by creditor; *Smith v. Rumsey*, 33 Mich. 183, holding that equity will treat payment by surety as giving to surety right to subrogation; *Moore v. Wright*, 14 Rich. Eq. 132; *Philadelphia & R. R. Co. v. Little*, 41 N. J. Eq. 519, 7 Atl. 356,—holding that surety is entitled to benefit of all securities which creditor holds against principal as indemnity against loss by reason of his suretyship; *Molsons Bank v. Heilig*, 25 Ont. Rep.

503, holding that where the creditor had released some of the security held by him, the surety was entitled to a reduction pro rata of his indebtedness.

Cited in note in 68 L.R.A. 524, on extinction of judgments against principals by sureties' payment.

Distinguished in *Bank of South Carolina v. Adger*, 2 Hill, Eq. 262, holding that a surety to a custom house bond having paid it is not entitled to be subrogated to the rights of the United States as against his co-surety.

Necessity that mortgagor allege and prove that debt has been paid where he relies upon security given as payment.

Cited in *Barnes v. Bradley*, 56 Ark. 105, 19 S. W. 319, holding that where collateral security has been given for payment of debt sued upon, it is incumbent on debtor, if he relies on that defense, to allege and prove that debt has been paid.

Distinction between simple contract and specialty debts.

Cited in *Post v. Mackall*, 3 Bland, Ch. 486, on the distinction between simple contract and specialty debts.

Right of trustee to be a purchaser of trust property.

Cited in *Lazarus v. Bryson*, 3 Binn. 54 (dissenting opinion), on the right of a trustee to be a purchaser of the trust property.

18 E. R. C. 216, *BANKES v. SMALL*, L. R. 36 Ch. Div. 716, 56 L. J. Ch. N. S. 832, 57 L. T. N. S. 292, 35 Week. Rep. 765.

Power of court to compel specific performance of covenant to disentail.

Cited in *Mills v. Fox*, L. R. 37 Ch. Div. 153, 57 L. J. Ch. N. S. 56, 57 L. T. N. S. 792, 36 Week. Rep. 219, on the power of the court to enforce a disentailing assurance; *Case v. Case*, 61 L. T. N. S. 789, 38 Week. Rep. 183, on the power of the court to compel disentailment; *Re Montagu* [1896] 1 Ch. 549, 65 L. J. Ch. N. S. 372, 74 L. T. N. S. 346, 44 Week. Rep. 583, holding that a court could enforce the execution of a disentailing assurance against an infant, under the trustee act.

Cited in note in 10 Eng. Rul. Cas. 794, 796-798, on invalidity of condition attempting to fetter right of tenant in tail to enlarge his estate into a fee simple.

18 E. R. C. 231, *THORNBOROUGH v. BAKER*, s. c. 1 Ch. Cas. 283, Freem. Ch. 143, 3 Swanst. 628, 1 Eq. Cas. Abr. 326 pl. 2, 2 Eq. Cas. Abr. 428 pl. 2.

Proceeds of mortgage as belonging to personal representative.

Cited in *Roath v. Smith*, 5 Conn. 133, holding that the heirs of the deceased mortgagee cannot sustain a bill for foreclosure but it must be by the executor, or administrator; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 8 Am. Dec. 467, holding that a mortgage interest before foreclosure is a chattel interest and belongs to the executor, not to the heir; *Jones v. Kirkpatrick*, 2 Tenn. Ch. 693, on the right of the personal representative of a deceased mortgagee to the proceeds of a mortgage as against the heir.

Instrument as absolute conveyance or mortgage.

Cited in *Hicks v. Hicks*, 5 Gill & J. 75, holding that if the contract is for security of money, it is a mortgage; if not, it is an absolute conveyance; *Hinkley v. Wheelwright*, 29 Md. 341, holding that as between grantor and grantee, where it appears that conditional sale was mere cloak to irredeemable mortgage, equity will let in grantor to redeem; *Bingham v. Thompson*, 4 Nev. 224; *Maffitt v. Rynd*, 69 Pa. 380; *Holton v. Meighen*, 15 Minn. 69, Gil. 50,—

holding that conveyance or assignment transferring estate, if originally intended by parties as security for money, although in form absolute conveyance, is in equity mortgage; *Livingston v. Wood*, 27 Grant, Ch. (U. C.) 515, on a conveyance as a deed or mortgage.

— Admissibility of parol evidence.

Cited in *Heath v. Williams*, 30 Ind. 495, holding that parol evidence is admissible to aid in distinguishing between conditional sale and mortgage; *Moore v. Wade*, 8 Kan. 380, holding that in equity parol evidence is admissible to show state of facts outside of deed, which would render deed a mortgage, or would render deed defeasable; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Reed v. Reed*, 75 Me. 264,—holding that conveyance made by deed absolute on its face, may be shown by written instrument not under seal or by parol to have been intended as security; *Cake v. Shull*, 45 N. J. Eq. 208, 16 Atl. 434; *Hobbs v. Rowland*, 136 Ky. 197, L.R.A.—, —, 123 S. W. 1185,—holding that parol evidence is admissible to show that deed absolute in its terms, is mortgage to secure debt; *Sweet v. Parker*, 22 N. J. Eq. 453; *Bachrach v. Bachrach*, 111 Va. 232, 68 S. E. 985; *Snively v. Pickle*, 29 Gratt. 27; *Vangilder v. Hoffman*, 22 W. Va. 1; *McCarron v. Cassidy*, 18 Ark. 34,—holding that parol testimony is admissible to prove that deed, absolute on its face, was intended as mortgage; *Booth v. Robinson*, 55 Md. 419, holding that parol evidence is admissible to show that absolute bill of sale was intended as security for debt only; *Shaw v. Walbridge*, 33 Ohio St. 1, holding that it may be shown by parol evidence that deed absolute on its face, though intended as mortgage, became absolute by release of equity of redemption; *Walker v. McDonald*, 49 Tex. 458, holding that parol evidence is admissible to show real intent of parties to defeasance, where purchaser under trust deed made instrument promising to reconvey; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265, holding that parol evidence that deed *prima facie* absolute was only meant as mortgage, must be explicit.

Cited in note in 18 Eng. Rul. Cas. 12, on test between mortgage and conditional sale.

— Disparity between value of land and purchase price as evidence.

Cited in *McDonald v. McDonell*, 2 U. C. Err. & App. 393, on the disproportion between the value of the land and the purchase money, as evidence that conveyance was a mortgage; *Fallon v. Keenan*, 12 Grant, Ch. (U. C.) 388, holding that insufficiency of supposed price constitutes, material circumstance in favor of transaction being treated as mortgage instead of deed.

Cited in 2 Devlin, Deeds 3d ed. 2,145, on inadequacy of price as showing a mortgage and not a sale.

— Loss of right to claim instrument mortgage by failure to make payment.

Cited in *Tufts v. Tapley*, 129 Mass. 380, holding that rights of grantor under deed intended as mortgage is lost by his failure to pay amount specified within stated time.

Validity of oral assignment of mortgage.

Cited in *Browne*, Stat. Frauds 5th ed. 78, on validity of oral assignment of mortgage.

Right of redemption.

Cited in *Villa v. Rodriguez* (*Alexander v. Rodriguez*) 12 Wall. 323, 20 L. ed. 406, on right to redeem where mortgagor has conveyed to mortgagee equity of redemption; *Winton v. Mott*, 4 Luzerne, Leg. Reg. 71, holding that all agree-

ments of parties tending to alter in any subsequent event, nature of mortgage and prevent equity of redemption are void; *Faulds v. Harper*, 2 Ont. Rep. 405, holding that so long as right of redemption exists, persons entitled to interests in equity of redemption may redeem in equity.

Admissibility of parol evidence to show consideration.

Cited in *O'Brien v. Paterson Brewing & Malting Co.* 69 N. J. Eq. 117, 61 Atl. 437, holding that parol evidence is admissible for purpose of showing real consideration for contract.

Notes given for purchase money and secured by mortgage as entitled to equality of satisfaction.

Cited in *Andrews v. Hobgood*, 1 Lea, 693, holding that notes given for purchase money of land, secured by lien on land sold are entitled to equality of satisfaction, without reference to time of their maturity or assignment.

Chargeability of mortgage creditor in possession as purchaser with profits where foreclosure decree is reversed.

Cited in *Robinson v. Alabama & G. Mfg. Co.* 89 Fed. 218, holding that mortgage creditor in possession as purchaser in good faith under erroneous decree in foreclosure afterwards reversed is chargeable on restitution with only profits actually earned by property.

Right of trustee to benefit from trust property.

Cited in *Hewson v. Smith*, 17 Grant, Ch. (U. C.) 407, holding that trustee for sale cannot claim for his own benefit judgments on trust property.

18 E. R. C. 238, *RE STEVEN*, 41 L. J. Ch. N. S. 537, L. R. 6 Eq. 597.

Sufficiency of general devise to pass mortgagee's estate.

Cited in *Martin v. Laverton*, L. R. 9 Eq. 563, 39 L. J. Ch. N. S. 166, 22 L. T. N. S. 700, 18 Week. Rep. 561, holding that the legal estate in a mortgage passed under a devise of the residue of realty.

—Legal estates generally.

Cited in *Re Charles*, 4 Ch. Cham. 19, holding that legal estate of mortgagee in fee will pass to devisee; *Re Brown*, L. R. 3 Ch. Div. 156, 35 L. T. N. S. 305, 24 Week. Rep. 782, holding that trust estates pass under a general devise notwithstanding a charge of legacies.

18 E. R. C. 244, *MATTHEWS v. WALLYN*, 4 Ves. Jr. 118.

Equities and defenses against assignee of a chose in action.

Cited in *DeWolf v. Howland*, 2 Paine, 356, Fed. Cas. No. 3,852, on the assignee of a bill of exchange given as substitute for a lien, as being subject to the same equities as the assignor; *Faull v. Tinsman*, 36 Pa. 108, holding that the equitable assignee of a chose in action takes subject to all the equities existing between the original parties.

Equities and defenses against assignee of mortgage.

Referred to as a leading case in *Baily v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385, on the assignee of a mortgage as taking it subject to all the equities existing between the original parties.

Cited in *Melendy v. Keen*, 89 Ill. 395, on the rights of the assignee who takes with the consent of the mortgagor; *Upham v. Brooks*, 2 Woodb. & M. 407, Fed. Cas. No. 16,797; *First Nat. Bank v. Honeyman*, 6 Dak. 275, 42 N. W. 771; *Sprague v. Graham*, 29 Me. 160,—on the assignee of a mortgage as taking subject to all equities which existed against it, between the mortgagee and mort-

gagor; *Cumberland Coal & I. Co. v. Parish*, 42 Md. 598, holding that the assignee stands in the same position that his assignor did, notwithstanding the recording acts; *Shannon v. Marselis*, 1 N. J. Eq. 413, holding that the assignee of a bond and mortgage holds the same subject to the same equity that existed against them in the hands of the mortgagee; *United States v. Sturges*, 1 Paine, 525, Fed. Cas. No. 16,414; *Losey v. Simpson*, 11 N. J. Eq. 246,—holding that the assignee of a mortgage takes it subject to the same equities that it was subject to in the hands of the original party, and in favor of the original debtor; *Nixon v. Haslett*, 74 N. J. Eq. 789, 70 Atl. 987, holding that mortgagor is estopped, in foreclosure suit by mortgagee's assignee, to claim rescission on ground of mortgagee's fraud, where at time of assignment he declared in writing to contrary; *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150, holding that an assignee for value takes subject to all defenses which the mortgagor or his grantor has, to the debt which the mortgage was given to secure; *Thompson v. Van Vechten*, 6 Bosw. 373, holding that whatever right the mortgagor had against the mortgagee he may assert against the assignee; *Stafford v. Van Rensselaer*, 9 Cow. 316, holding that such an assignee took subject to all the equities existing under the agreement between the mortgagor and mortgagee; *Mickles v. Townsend*, 18 N. Y. 575, holding that where the assignee, from the grantor of the equity of redemption with warranty, who afterward becomes the assignee of the mortgage, takes it without a lien as against the grantee from the former; *Mott v. Clark*, 9 Pa. 399, 49 Am. Dec. 566, holding that an assignee of a mortgage takes subject to the equities of the mortgagor but not as to latent equities of the cestuis que trust of the mortgagor or other persons; *Stoner v. Harris*, 81 Va. 451, holding that an equity which has originally attached to a bond will follow it into the hands of an assignee with or without notice; *Lawson v. Jones*, 40 N. S. 303, holding that the assignee of the mortgage took subject to the agreement between the mortgagor and mortgagee although he had no knowledge of it; *Martin v. Bearman*, 45 U. C. Q. B. 205, on the assignee of a chattel mortgage as subject to agreement between mortgagor and mortgagee; *Henderson v. Brown*, 18 Grant, Ch. (U. C.) 79, on the assignee of a mortgage as subject to the equities existing between the mortgagor and mortgagee; *Court v. Holland*, 29 Grant, Ch. (U. C.) 19, holding that the right of set-off passed to the official assignee of an insolvent mortgagor, and that a transferee of the security took it subject to the equity.

Cited in notes in 18 Eng. Rul. Cas. 155, on capitalization of arrears of interest without consent of mortgagor on the transfer of the mortgage; 21 Eng. Rul. Cas. 717, 748, on rights of purchaser for value without notice.

Distinguished in *Crosby v. Tanner*, 40 Iowa, 136, holding that the assignee of a note and mortgage after maturity takes it exempt from equities in favor of third parties to which it might be subject in the hands of the assignor; *Carpenter v. Longan*, 16 Wall. 271, 21 L. ed. 313; *Bell v. Kellar*, 13 Bush. 381; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638,—holding that the assignee of a mortgage given to secure a negotiable note, takes it discharged of all equities; *Croft v. Bunster*, 9 Wis. 503, holding that where the mortgage is given to secure a promissory note, the assignee does not take it subject to existing equities; *Dixon v. Winch* [1900] 1 Ch. 736, 69 L. J. Ch. N. S. 465, 82 L. T. N. S. 437, 48 Week. Rep. 612, 16 Times L. R. 276, 68 L. J. Ch. N. S. 572, 47 Week. Rep. 620, 81 L. T. N. S. 111, holding that where the mortgagor was a party to false recitals, and when the mortgage debt had been retained by the counsel out of the purchase price, he could not claim the benefit of the rule that the assignee was subject to all equities.

—Accounts and set-offs.

Cited in *Carmalt v. Post*, 8 Watts, 406, on the right of the mortgagor to setoff claims against the assignee of the mortgage; *Wright v. Eaves*, 10 Rich. Eq. 582, holding that an assignee of the mortgage, without the concurrence of the mortgagor takes it subject to the same equities and settlement of accounts, as the mortgagee would be; *Penn v. Lockwood*, 1 Grant, Ch. (U. C.) 547; *Turner v. Smith* [1901] 1 Ch. 213, 70 L. J. Ch. N. S. 144, 49 Week. Rep. 186, 83 L. T. N. S. 704, 17 Times L. R. 143, holding that the assignee of a mortgage without privity of the mortgagor, takes same subject to the state of account between the mortgagor and mortgagee; *James v. Morey*, 2 Cow. 246, 14 Am. Dec. 475; *Warren v. McKenzie*, 1 Grant, Ch. (U. C.) 436,—holding like assignee takes subject to the state of account between mortgagee and mortgagor, when the latter receives notice of the assignment; *Moffatt v. Bank of Upper Canada*, 5 Grant, Ch. (U. C.) 374, on the purchaser of an equity of redemption as taking subject to all the accounts between the parties.

Distinguished in *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, holding that a payment to the mortgagee after assignment would not benefit the mortgagor although the mortgage and note were in the mortgagee's hands, where the mortgage secured a negotiable note.

Right of setoff against mortgagee.

Cited in *Ryan v. Casey*, 1 Pearson (Pa.) 153, on the right to setoff a judgment against a mortgagee.

Mortgage as a chose in action.

Cited in *Porter v. Seeley*, 13 Conn. 564, on the mortgage as a chose in action; *Dougherty v. Randall*, 3 Mich. 581, on the interest of a mortgagee as a mere personal chattel; *Jackson ex dem. Norton v. Willard*, 4 Johns. 41, on the right to seize a mortgage by execution, and sell as a chose in action; *Bury v. Hartman*, 4 Serg. & R. 175, on the assignment of a mortgage as the assignment of a chose in action.

—Assignability.

Cited in *Stoney v. Shultz*, 1 Hill, Eq. 465, 27 Am. Dec. 429, on the right to assign a mortgage.

Cited in *Browne Stat. Frauds* 5th ed. 78, on validity of oral assignment of mortgage.

Transfer of debt as carrying with it the mortgage.

Cited in *Reeves v. Hayes*, 95 Ind. 521, holding that the transfer of the note carries with it the mortgage given to secure it.

Right to open settled account between parties in fiduciary relations.

Cited in *State v. Illinois C. R. Co.* 246 Ill. 188, 92 N. E. 814, holding that where parties stand in confidential relations to each other, stated accounts between them will be more readily opened and on slighter grounds than will ordinary stated accounts; *Swayze v. Swayze*, 37 N. J. Eq. 180, holding that where matters of account were equally within the knowledge of both parties, and there was no surprise, and the settlement allowed to stand for a number of years, it will not be opened although one party was the agent of the other; *Planters' Bank v. Hornberger*, 4 Coldw. 531, on the right to open a settled account between attorney and client; *McDow v. Brown*, 2 S. C. 95; *Seabright v. Seabright*, 28 W. Va. 412,—on the right to open a settled account because of fraud; *Davis v. Hawke*, 4 Grant, Ch. (U. C.) 394, holding that signed acknowledgment of debt by client was not *prima facie* evidence in favor of attorney.

Cited in *Week's Attys.* 2d ed. 148, on opening accounts between attorney and client; *Parsons Partn.* 4th ed. 516, on opening of accounts between partners for error.

18 E. R. C. 265, *PLEDGE v. WHITE* [1896] A. C. 187, 65 L. J. Ch. N. S. 449, 74 L. T. N. S. 323, 44 *Week. Rep.* 589, affirming the decision of the Court of Appeal reported in [1895] 1 Ch. 51, which affirmed the decision of *Romer, J.*, reported in [1894] 2 Ch. 328.

Right of owner of two mortgages by same mortgagor to consolidate them.

Cited in *Silverthorn v. Glazebrook*, 30 Ont. Rep. 408, holding that the mortgagee of land of which the defendant was owner of the equity of redemption, and who was also derivative mortgagee from the latter of other lands, could consolidate his claims and foreclose without making the original mortgagor a party.

Distinguished in *Riley v. Hall* [1898] W. N. 81, 79 L. T. 244, holding that where there were two mortgages given by the same person, one to two persons jointly and the other to one of the same two, the other of these two afterward dying the remaining one could not consolidate the two mortgages.

Stare decisis.

The decision of the Court of Appeal was cited in *Stuart v. Bank of Montreal*, 41 Can. S. C. 516, holding that only in very exceptional cases should supreme court refuse to follow its own decisions; *Manley v. Collom*, 8 B. C. 153, holding that court is bound by former decisions of court.

18 E. R. C. 278, *ROGERS v. CHALLIS*, 27 Beav. 175, 6 Jur. N. S. 334, 29 L. J. Ch. N. S. 240, 7 *Week. Rep.* 710.

Specific performance of a contract to loan money.

Cited in *Sichel v. Mosenthal*, 31 L. J. Ch. N. S. 386, 30 Beav. 371, 8 Jur. N. S. 275, 5 L. T. N. S. 784, 10 *Week. Rep.* 283, 18 *Eng. Rul. Cas.* 282, holding the specific performance of an agreement to enter into a partnership over lien thereof to make a loan of money, would not be decreed; *Larios v. Gurety*, L. R. 5 P. C. 346, holding equity would not decree the specific performance of an agreement to loan money; *Western Wagon & Property Co. v. West* [1892] 1 Ch. 271, 61 L. J. Ch. N. S. 244, 66 L. T. N. S. 402, 40 *Week. Rep.* 182, on same point.

Distinguished in *Calvert v. Burnham*, 6 Ont. App. Rep. 620, holding specific performance might be had of an agreement to loan money on a mortgage by an assignee of the mortgagor where the mortgagee advanced only part of the amount and held the mortgage as security for the entire amount; *Gorringe v. Land Improv. Soc.* [1899] 1 Ir. Ch. 142, holding a person entering into an agreement with a land improvement company for the making of loans to him when such loans sanctioned by the Board of Works, might have a specific performance of such agreement.

— To assign a mortgage.

Cited in *Monarch Life Assur. Co. v. Brophy*, 14 Ont. L. Rep. 1, on no right as existing to have specific performance of an agreement to assign a mortgage.

Damages in lieu of specific performance or injunction.

Cited in *Campbell v. Simmons*, 15 Grant, Ch. (U. C.) 506, on court having no jurisdiction to decree specific performance as having no jurisdiction to grant damages.

Cited in notes in 20 L.R.A. 757, on damages in lieu of injunction; 6 E. R. C.

644, on refusal to enforce specific performance of contract, performance of which cannot be of importance to plaintiff.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 535, as to when damages will be given in place of, or in addition to, a specific performance; *Pomeroy*, Spec. Perf. 2d ed. 67, on refusal of specific performance of contracts concerning chattels where legal remedy is sufficient.

18 E. R. C. 282, *SICHEL v. MOSENTHAL*, 30 Beav. 371, 8 Jur. N. S. 275, 31 L. J. Ch. N. S. 386, 5 L. T. N. S. 784, 10 Week. Rep. 283.

Agreements enforceable in specie.

Cited in *Gusdorff v. Schleisner*, 85 Md. 360, 37 Atl. 170, on equity as not decreeing the specific performance of a partnership agreement; *Rudiger v. Coleman*, 112 App. Div. 279, 98 N. Y. Supp. 461, holding court would not decree the specific performance of a contract to form a corporation to exploit lands where parties to contract are hostile to one another and not able to come to terms.

Specific performance.

Cited in notes in 19 E. R. C. 614, on specific performance of agreement to execute partnership articles; 6 E. R. C. 644, on refusal to enforce specific performance of contract, performance of which cannot be of importance of plaintiff.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 67, on refusal of specific performance of contracts concerning chattels where legal remedy is sufficient.

— Of an agreement to loan money.

Cited in *Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co.* 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499, holding an agreement by one person to make advances to meet the obligations of another, to be repaid by the latter on demand was not enforceable in equity; *Larios v. Gurety*, L. R. 5 P. C. 346, holding equity would not decree the specific performance of an agreement to loan money; *Western Wagon & Property Co. v. West* [1892] 1 Ch. 271, 61 L. J. Ch. N. S. 244, 66 L. T. N. S. 402, 40 Week. Rep. 182, on no right as existing to have the specific performance of an agreement to loan money.

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— To assign a mortgage.

Cited in *Monarch Life Assur. Co. v. Brophy*, 14 Ont. L. Rep. 1, on right to have specific performance of an agreement to assign a mortgage.

18 E. R. C. 289, *CHESTERFIELD v. JANSSEN*, 1 Atk. 301, 2 Ves. Sr. 125, 1 White & T. Lead. Cas. (7th ed.) 289, 1 Wils. 286.

Jurisdiction of equity in cases of fraud.

Cited in *Hargis v. Campbell*, 14 Fla. 27, on the jurisdiction of equity in cases of fraud; *Chase v. Manhardt*, 1 Bland, Ch. 333; *Rutherford v. Williams*, 42 Mo. 18; *Eggers v. Anderson*, 63 N. J. Eq. 264, 55 L.R.A. 570, 49 Atl. 578; *Cohen v. Ellis*, 16 Abb. N. C. 320; *Henderson v. Hays*, 2 Watts, 148; *Fowler's Appeal*, 87 Pa. 449, 36 Phila. Leg. Int. 36; *Pierpont v. Fowle*, 2 Woodb. & M. 23, Fed. Cas. No. 11,152; *Bulli Coal Min. Co. v. Osborne* [1899] A. C. 351, 68 L. J. P. C. N. S. 49, 47 Week. Rep. 545, 80 L. T. N. S. 430, 15 Times L. R. 257; *Woodman v. Freeman*, 25 Me. 531,—on jurisdiction of equity to relieve against fraud;

Ferson v. Sanger, 2 Ware, 252, Fed. Cas. No. 4751, on whether equity would entertain jurisdiction of a suit for damages arising out of a fraud; *Loomis v. Tift*, 16 Barb. 541, holding equity had jurisdiction to relieve against a conveyance by an insolvent debtor in fraud of creditors; *Gandolfo v. Hood*, 1 Pearson (Pa.) 269, holding equity had jurisdiction to grant relief where an agent receiving a fund for the settlement of a claim settles for a less amount than given him, concealing such fact from his principal; *Oil Co. v. Riddle*, 6 Phila. 495, 25 Phila. Leg. Int. 12, holding equity had jurisdiction of a bill against administrators of a fraudulent projector of an oil company; *Read v. Mosby*, 87 Tenn. 759, 5 L.R.A. 122, 11 S. W. 940, holding that voluntary conveyance by insolvent heir presumptive, to his wife, of his expectancy in estate of his father, then living, is invalid in equity as against creditors whose debts existed at father's death; *Harding v. Wheaton*, 2 Mason, 278, Fed. Cas. No. 6051, holding equity had jurisdiction to entertain a suit by heirs to set aside a deed of land from their ancestor by undue influence he being mentally and physically infirm; *Crippen v. Ogilvie*, 18 Grant, Ch. (U. C.) 253, holding that where property of incompetent is procured from him by fraud equity may interfere.

Cited in *Parsons*, Partn. 4th ed. 514, on opening of account between partners for fraud; 1 Beach Trust, 379, on fraud as the basis of a constructive trust; 1 Beach, Trust, 399, on constructive trust from renewal of lease; *Smith Eq. Rem.* 280, on enforcement of pure trust as within jurisdiction of a court of equity; *Smith, Eq. Rem.* 200, on right to resort to equity without obtaining judgment where plaintiff's claim has some equitable element therein.

Distinguished in *Broddus v. McCall*, 3 Call (Va.) 546, holding that equity would require an accounting and repayment of moneys unjustly obtained by reason of an advance in the price charged above the market price, the price agreed upon, the seller being an English merchant, and the buyer not knowing the real market price in England.

— Cancellation or release.

Cited in *Kennedy v. Kennedy*, 2 Ala. 571, holding equity would decree the cancellation of a deed absolute on its face and expressing a money consideration was shown that grantee promised to hold for the heirs of grantor and reconvey to them, which promise he refused to perform. *Sears v. Hicklin*, 13 Colo. 143, 21 Pac. 1022, setting aside a conveyance of a large amount of land for an inadequate consideration by a woman unskilled in the English language and ignorant of business to her business adviser who represented that deed did not convey tracts which it did; *Kelly v. McGuire*, 15 Ark. 555, holding a conveyance would be set aside in equity where it appeared grantor assigned an estate without making any provision for himself when he needed it and it appearing he was under no obligation to make it; *Wiest v. Garman*, 4 Houst. (Del.) 119 (affirming 3 Del. Ch. 422), holding that unconscionable bargain made with person of weak understanding may be set aside in equity; *Clough v. Adams*, 71 Iowa, 17, 32 N. W. 10, holding a conveyance of real estate would be rescinded where it showed that the plaintiffs were of weak understanding and conveyed for a worthless patent; *Denison v. Gibson*, 24 Mich. 187, holding a surety of the purchase price of stock of a national bank is entitled to a release in equity where material parts of the arrangement for the sale of the stock carried out without sureties knowledge were illegal as opposed to public policy; *Dunn v. Chambers*, 4 Barb. 376, on when equity will relieve against an improvident sale and conveyance of his real estate; *Jolliffe v. Hite*, 1 Call (Va.) 301, 1 Am. Dec. 519, holding a person buying a tract of land for so many acres more or less will not be relieved

in equity where on a survey it is found to contain less than the estimated quantity; *Encking v. Simmons*, 28 Wis. 272; *Helbreg v. Schumann*, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. 39,—holding that courts of equity will set aside contracts made with insane persons on ground of fraud; *Cole v. Getzinger*, 96 Wis. 559, 71 N. W. 75, holding that a conveyance will be set aside whenever it has been obtained through undue influence over a person of advanced age greatly under the power and influence of another.

Cited in note in 6 E. R. C. 876, on undue influence as ground for avoidance of contract.

—To make person fraudulently benefiting trustee.

Cited in *Sumner v. Staton*, 151 N. C. 198, 65 S. E. 902, 18 Ann. Cas. 802, holding that where executor acquired property by deeds and under will by fraud, court, in administering equities and doing substantial justice, will decree executor trustee ex maleficio.

—To grant relief from mistake.

Cited in *Marvin v. Bennett*, 26 Wend. 169, holding that equity will not relieve against mistake in conveyance of lands in respect to quantity conveyed unless proof is clear and, direct and positive.

Enforcement of contracts in equity to prevent fraud.

Cited in *Tom v. Daily*, 4 Ohio, 368, holding where a slave was purchased under a promise to emancipate such promise may be specifically enforced in equity; *McCartney v. Bostwick*, 32 N. Y. 53, on equity as having jurisdiction to decree the performance of trust obligations.

Nominal damages for partial failure of title where defect was known.

Cited in *Leland v. Stone*, 10 Mass. 459, holding that where a person conveyed land under warranty to another, a portion of which had been conveyed to another and improved by him to grantee's knowledge and the deed thereto duly executed and recorded, the grantee, in an action on the covenant, was only entitled to nominal damages for such partial failure of title.

Title acquired by one beneficiary enuring to all.

Cited in *Harrison v. Winston*, 2 Tenn. Ch. 544, holding that tax title acquired by one beneficiary under assignment for creditors enures for benefit of all.

Fraud as grounds of refusal of equitable relief.

Cited in *Baird v. Howison*, 154 Ala. 359, 45 So. 668, holding equity would not enforce a trust in favor of a grantor where it arose from a transfer of property fraudulent as to creditors; *Barnes v. Starr*, 65 Conn. 136, 28 Atl. 980, refusing to cancel an ante-nuptial contract entered into between plaintiff and defendant's testator where it was executed for the purpose of deceiving the heirs at law of plaintiff's intended husband; *Peter v. Wright*, 6 Ind. 183, holding a payment of money as a prominent element of a compromise tainted with fraud could not be supported in equity; *Jackson v. Marshall*, 5 N. C. (1 Murph.) 323, 3 Am. Dec. 695, holding equity would not enforce an agreement to reconvey property where the conveyance was made for the purpose of defeating the rights of creditors; *Adams v. Barrett*, 5 Ga. 404, on equity as refusing relief where parties to a contract are in *pari delicto*.

Proof of fraud by parol evidence in equity.

Cited in *Greenshields v. Barnhart*, L. R. 2 A. C. 91, on the point that fraud may be proved by parol evidence in equity as well as at law.

Fraud.

Cited in *Rice v. Rice*, 5 Luzerne Leg. Reg. 207, on fraud in equity being proved by the court, and that it may be presumed; *Belcher v. Belcher*, 10 Yerg. 121, holding fraud to be all acts, omissions and concealments which involve a breach of either legal or equitable duty trust or confidence justly reposed; *Sears v. Shafer*, 1 Barb. 408; *Lyon v. Tallmadge*, 14 Johns. 501; *Hyde v. Nick*, 5 Leigh, 336 (dissenting opinion); *Conant v. Jackson*, 16 Vt. 335; *Broome v. Beers*, 6 Conn. 198,—on what will be relieved against in equity as fraud; *Causey v. Wiley*, 27 Ga. 444; *Taylor v. Atwood*, 47 Conn. 498,—on what would be considered as fraud in equity.

—Classes of fraud.

Cited in *Schriber v. Rapp*, 5 Watts, 351, 30 Am. Dec. 327; *Dundas's Estate*, 8 Phila. 598, 28 Phila. Leg. Int. 204; *Bokee v. Walker*, 14 Pa. 139; *Pressley v. Kemp*, 16 S. C. 334, 42 Am. Rep. 635; *Hinchman v. Emans*, 1 N. J. Eq. 100, —as classifying the species of fraud which are the foundation of equitable relief.

—By implication or construction.

Cited in *Kayser v. Naugham*, 8 Colo. 232, 6 Pac. 803; *Stewart v. Stewart*, 5 Conn. 316; *Wilson v. Lott*, 5 Fla. 305; *Ward v. Lamberth*, 31 Ga. 150; *Jackson ex dem. Cadwell v. King*, 4 Cow. 207, 15 Am. Dec. 354; *Rogers v. Cruger*, 7 Johns. 557; *Vulcan Oil Co. v. Simons*, 6 Phila. 561, 25 Phila. Leg. Int. 156; *Balkum v. Breare*, 48 Ala. 75,—on circumstances from which fraud may be presumed in equity; *Watkins v. Stockett*, 6 Harr. & J. 435, holding that fraud may be inferred from facts and circumstances, from character of contract, or from condition and circumstances of parties; *Jones v. Emery*, 40 N. H. 348, on fraud as not implied from doubtful circumstances only awakening a suspicion; *Mason v. Williams*, 3 Munf. 126, 5 Am. Dec. 505; *Bresce v. Bradfield*, 99 Va. 331, 38 S. E. 196; *Tracy v. Walker*, 1 Flipp. 41, Fed. Cas. No. 14,129; *Gale v. Wills*, 12 Barb. 84 (dissenting opinion),—on right to presume fraud from the circumstances and condition of the parties; *Smith v. Harrison*, 2 Heisk. 230; *Morgan v. Elam*, 4 Yerg. 375,—on the existence of the right to presume fraud in equity; *Smith v. Elliott*, 1 Patton & H. (Va.) 307 (dissenting opinion), on when fraud will be presumed in equity; *Huxley v. Rice*, 40 Mich. 73, holding a person who has sold mortgaged land with warranty and covenanted to pay off the mortgage cannot make title in himself as against his grantee by allowing foreclosure and redeeming himself; *McCants v. Bee*, 1 McCord, Eq. 383, 16 Am. Dec. 610, on equity as relieving against presumptive fraud.

—Where fiduciary or confidential relations existed.

Cited in *Bollman v. Loomis*, 41 Conn. 581, holding equity would presume fraud where a person acting as the friend and confidential adviser of a purchaser should at the same time secretly receive compensation from the seller; *Grubbs v. McGlawn*, 39 Ga. 672, holding a purchase by an administratrix at her own sale might be avoided in equity; *Ball v. Reyburn*, 136 Mo. App. 546, 118 S. W. 524, holding that contract to pay attorney's fee will not be held unconscionable unless it is such that no man in his senses and not under delusion would make on one hand no fair man would accept on the other; *Gorman v. McCabe*, 24 R. I. 245, 52 Atl. 989, setting aside a release given by a residuary legatee who was an old woman unable to read or write and ignorant of business, the respondent being her confidential adviser and there being no understanding on her part that she was to release him; *Gallatian v. Cunningham*, 8 Cow. 261, holding fraud would be presumed where the guardian of minors advised a petition for partition which made a sale of the property at a sacrifice necessary where the commissioners

friends of guardian and it appeared he intended to purchase other lands; *Hall v. Perkins*, 3 Wend. 626, holding fraud would be presumed where an uncle, a man of business, induced his nephew an ignorant young fellow to accept a conveyance of land in satisfaction of a claim of almost twice its value; *Butler v. Haskell*, 4 Desauss Eq. 651, holding a sale by heirs of an idiot, of their interest in the estate to their agent in the management of their affairs would be set aside where it was shown they were illiterate and poor and were having difficulty in establishing the relationship and the price was grossly inadequate; *Birdsong v. Birdsong*, 2 Head, 289, holding that conveyance of man habitually intemperate, but not actually drunk, of all his property in trust for his wife and children will not be set aside on ground of undue influence, apart from fraud.

Cited in 2 *Beach, Trust*, 1598, on waiver of claim by beneficiary against trustee; *Underhill, Am. Ed. Trusts*, 469, on concurrence of beneficiary in trustee's breach of trust, or release from same.

— Where coupled with mistake of law.

Cited in *Lewis v. Cooper, Cooke (Tenn.)* 467, holding an agreement of compromise fairly entered into will not be set aside because the party seeking relief was mistaken in the law; *Jones v. Watkins*, 1 Stew. (Ala.) 81, on mistake as to law as grounds for equitable relief where mistake induced by fraud.

—Purchase of expectancy or reversion.

Cited in *May v. May*, 7 Fla. 207, 68 Am. Dec. 431, on necessity in equity, of purchaser of a reversion proving he gave a full price; *Boynton v. Hubbard*, 7 Mass. 112, holding a contract by a heir to convey on death of ancestor a certain part of what shall come to the heir by descent is fraudulent as to the ancestor and void in equity; *Woodward's Estate*, 1 Chest. Co. Rep. 417, on enforcement of sale or assignment of expect and interest of an heir when the ancestor from whom the expectancy is to come is cognizant of the transaction; *Read v. Mosby*, 87 Tenn. 759, 5 L.R.A. 122, 11 S. W. 940, holding an assignment without consideration of an estate in expectancy by an insolvent is fraudulent to creditors and will be set aside; *Hale v. Hollon*, 90 Tex. 427, 36 L.R.A. 75, 59 Am. St. Rep. 819, 39 S. W. 287, holding judgment creditors of heir could not avoid his sale of a mere expectancy in absence of contract rights or fraud in the transaction; *Bogle's Estate*, 9 W. N. C. 256, holding that purchase money received upon unfair sale of heir's expectancy must be refunded before rescission of conveyance.

Cited in notes in 33 L.R.A. 280, on sale of expectancy by prospective heir; 24 E. R. C. 765, 766, on validity and enforceability of assignment of expectancy.

Distinguished in *Cribbins v. Markwood*, 13 Gratt. 495, 67 Am. Dec. 775, holding a sale of a reversion would not be set aside because of mere inadequacy of price where no fraud or imposition was found.

—Exorbitant loans.

Cited in *Palmer v. Leffler*, 18 Iowa, 125, holding the payment of an unusually high and excessive rate of interest where no usury laws was not intrinsically fraudulent where affirmatively shown that no undue influence was used; *Howells v. Pacific States Sav. Loan & Bldg. Co.* 21 Utah, 45, 81 Am. St. Rep. 659, 60 Pac. 1025, holding a contract with a loan company which requires the borrower to pay on a loan of fifteen hundred dollars, sums aggregating three thousand dollars and interest on the loan besides is an unconscionable; *Aylesford v. Morris*, L. R. 8 Ch. 484, 42 L. J. Ch. N. S. 546, 28 L. T. N. S. 541, 21 Week. Rep. 424, holding equity would relieve against acceptances given by a young man to a

professional money lender for sums loaned where the interest and discount was at a rate exceeding sixty per cent; *Benyon v. Cook*, L. R. 10 Ch. 389, on right of mortgagor of a reversion to relief against an exorbitant rate of interest.

— **Unconscionable contracts or overreaching bargain or imposition.**

Cited in *Greer v. Tweed*, 13 Abb. Pr. N. S. 427, holding that promise to pay \$165 per day for every day's delay in furnishing biography to plaintiff will not be enforced where delay was 161 days; *Mound City Mut. L. Ins. Co. v. Hamilton*, 3 Tenn. Ch. 228; *Veazie v. Williams*, 8 How. 134, 12 L. ed. 1018; *Brown v. Hall*, 14 R. I. 249, 51 Am. Rep. 375,—on inadequacy of consideration as creating a presumption of fraud; *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530, rescinding a contract for fraud on proof that complainant when in embarrassed financial circumstances sold his farm to defendant partly for cash and partly for land he had never seen and not worth more than half the amount at which it was estimated; *Wiest v. Garman*, 4 Houst. (Del.) 119, 3 Del. Ch. 422, on the payment of an exorbitant price as evidence of fraud; *Loring v. Dunning*, 16 Fla. 119, holding the sale of property of the value of twenty thousand dollars for an indefinite sum, not to exceed five thousand dollars was fraudulent on the part of the grantor; *Owings's Case*, 1 Bland, Ch. 370, 17 Am. Dec. 311, on it being fraudulent to obtain a deed by undue influence; *Turner v. Pabst Brewing Co.* 74 App. Div. 106, 77 N. Y. Supp. 360, holding equity would rescind a contract for the purchase of a liquor saloon and chattel where the purchaser's wife transferred property in which she had an equity and where the value of the saloon, and chattels were grossly exaggerated; *Sprinkle v. Wellborn*, 140 N. C. 163, 3 L.R.A.(N.S.) 174, 111 Am. St. Rep. 827, 52 S. E. 666, holding a contract between parties one of whom was mentally weak would be presumed to be fraudulent in equity; *Fishburne v. Ferguson*, 84 Va. 87, 4 S. E. 575, holding fraud would be presumed in the making of a conveyance of real and personal property of value of six thousand dollars in consideration that grantees provide for grantor for remainder of life where made by a man nearly seventy years old, mentally and physically infirm and subject to hallucinations; *Kuelkamp v. Hidding*, 31 Wis. 503, holding equity would relieve plaintiff from a conveyance of his land at a price not exceeding one third of its value where it appeared he was ignorant and illiterate and he was placed in fear by misrepresentations of defendant as his personal peril from his neighbors; *Brakeley v. Tuttle*, 2 W. Va. 86 on what is necessary to constitute a contract unconscionable in equity; *Warner v. Daniels*, 1 Woodb. & M. 90, Fed. Cas. No. 17,181, on failure of consideration as evidence of fraud.

Distinguished in *Leet v. McMaster*, 51 Barb. 236, holding a conveyance would not be set aside on the assumption that fraud must have existed where it was shown that at least two thirds of the value of the property was paid.

Waiver of right to equitable relief against fraud.

Cited in *Sanger v. Wood*, 3 Johns. Ch. 416, holding that equity will not relieve a party fully apprised of his rights and deliberately confirming a former act; *Edwards v. Roberts*, 7 Smedes & M. 544, on how party may waive his right to relief against fraud; *Lauer's Appeal*, 12 W. N. C. 165, on how person may waive his right to relief against fraud.

— **By new contract.**

Cited in *Edwards v. Handley*, *Hardin* (Ky.) 602, 3 Am. Dec. 745, on party as having no claim for relief against a confirmation of a contract fairly obtained without any pretense of fear or duress; *Pintard v. Martin*, *Smedes & M.* Ch. 126, holding complainant was not entitled in equity to relief against a

fraud where after learning of the fraud he entered into a new contract concerning it; *Boyd v. Hawkins*, 17 N. C. (2 Dev. L.) 195, holding a sale made by a cestui que trust in financial difficulties at the instance of the trustee and under a mistaken estimate of his services was not remedied by a subsequent deed by the cestui que trust without knowledge the first was invalid; *Goddin v. Vaughn*, 14 Gratt. 102, on a person confirming a contract with knowledge that he is not getting all he bargained for as being bound thereby without a new consideration.

Distinguished in *Duncan v. McCullough*, 4 Serg. & R. 483, holding a contract fraudulent and void cannot be confirmed by subsequent declarations acknowledging its fairness.

Illegal contracts and effect of.

Cited in *Hume v. United States*, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 134, holding that market price only could be recovered from United States government for quantity of shucks, where contract rate was 60 cents per pound and market value only $\frac{3}{4}$ of a cent per pound; *Henninger v. Heald*, 52 N. J. Eq. 431, 29 Atl. 190, holding that corrupt bargaining between one of parties to exchange of lands and agent of other renders such exchange voidable at instance of party aggrieved.

Illegal acts as impossible of ratification.

Cited in *United States v. Mertz*, 2 Watts, 406; *Wilkinson v. Dodd*, 40 N. J. Eq. 123, 3 Atl. 360,—on an illegal act as impossible of ratification; *Stanard v. Sampson*, 23 Okla. 13, 99 Pac. 796, holding that where part of consideration for agreement is for discontinuance of prosecution for crime ratification of such agreement is opposed to public policy and void; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427, 3 Legal Gaz. 90, holding that where contract is void on ground of public policy or against statute confirmation is affected with original taint.

Sufficiency of ratification of act.

Cited in *Loeb v. Flash Bros.* 65 Ala. 526, holding that ratification of act must be done with knowledge of facts; *Fish v. Miller*, Hoffm. Ch. 267, holding that acquiescence by ward with guardian's account can be inferred from lapse of time only where ward has full knowledge of all facts.

Void conditions in testamentary gift.

Cited in *Re Anonymous*, 80 Misc. 10, 141 N. Y. Supp. 700, holding that condition in testamentary gift to adoptive parent, requiring parent to set aside adoption of child, is void as against public policy.

Fraud as affecting subsequent contracts.

Cited in *Read v. Staton*, 3 Hayw. (Tenn.) 159, 9 Am. Dec. 740, on a sale void for fraud as against creditors as not made good by a sale by the vendee to one not conusant of the fraud.

Confirmatory bargains under stress of original fraud.

Cited in *McCormick v. Malin*, 5 Blackf. 509, holding a person not bound by his confirmation of a sale where still subject to the same undue influence and delusive impression under which the sale was made.

Contracts specifically enforceable in equity.

Cited in *Nevada Nickel Syndicate v. National Nickel Co.* 96 Fed. 133, on when a specific performance will be decreed in equity.

—Bargains for expectancies.

Cited in *Dixon v. Bentley*, 68 N. J. Eq. 108, 59 Atl. 1036, holding equity would enforce the assignment of a remainderman's expectancy in a certain fund;

Marks v. Gates, 14 L.R.A.(N.S.) 317, 83 C. C. A. 321, 154 Fed. 481, 12 Ann. Cas. 120, refusing to compel the specific performance to convey to complainant a one fifth interest in all the property defendant should acquire in Alaska, where the expressed consideration was one dollar, but really was an indebtedness of twelve thousand dollars, and the property acquired was valued at seven hundred and fifty thousand dollars.

— **Proof of fraud.**

Cited in *Greenshields v. Barnhart*, 3 Grant, Ch. (U. C.) 1, on express fraud as subject to proof by parol evidence.

Contract void as against public policy.

Cited in *Piatt v. Oliver*, 2 McLean, 267, Fed. Cas. No. 11,115, holding that agreement not to bid against each other at sale on execution is void as against public policy; *Goodrich v. Tenney*, 144 Ill. 422, 19 L.R.A. 371, 36 Am. St. Rep. 459, 33 N. E. 44, as an example of when a contract may be void as against public policy; *Boardman v. Thompson*, 25 Iowa, 487, on champertous contracts as being void as against public policy; *Mitchell v. Smith*, 4 Yeates, 84; *Johnston v. Fargo*, 184 N. Y. 379, 7 L.R.A.(N.S.) 537, 77 N. E. 388, 6 Ann. Cas. 1,—on contracts subverting the public interest as being void as against public policy; *Wenninger v. Mitchell*, 139 Mo. App. 420, 122 S. W. 1130, holding that contract by one wishing to be married to pay for services in getting husband by correspondence is against public policy and void.

— **Tendency towards frauds.**

Cited in *Sharp v. Teese*, 9 N. J. L. 352, 17 Am. Dec. 479, holding a note given by an insolvent debtor to two of his creditors that they may withdraw their opposition to his discharge as under the insolvent act is void as against public policy; *Bonisteel v. Saylor*, 17 Ont. App. Rep. 505, holding notes taken for sale of oats with an agreement to secure a purchaser for a larger quantity at the same price were void as against public policy, because of fact that a loss must result eventually to some one.

Usurious contracts.

Cited in *Fitzsimmons v. Baum*, 44 Pa. 32, on when contracts void as usurious; *Brummel v. Enders*, 18 Gratt. 873, on usury as being a question of law for court; *Scott v. Lloyd*, 9 Pet. 418, 9 L. ed. 178, on when a contract may be avoided as usurious; *Wilson v. Kilburn*, 1 J. J. Marsh. 494, holding there is no usury where a lender risks his principal upon a contingency of the depreciation of commercial paper, that interest is at a greater rate than six per cent; *Norcross v. Cambridge*, 166 Mass. 508, 33 L.R.A. 843, 44 N. E. 615, to the point that taking of interest was at common law unlawful; *Houghton v. Page*, 2 N. H. 42, 9 Am. Dec. 30, on interest being unlawful at one time in England; *Braynard v. Hoppock*, 7 Bosw. 157, holding that written contract to advance on ship loading at certain place to pay 12 per cent for use of money and seven per cent interest and as security to assign policies on ship and on freight and to make bill of sale is usurious; *Pawling v. Pawling*, 4 Yeates, 220, on a covenant to turn interest into principal as not being illegal; *Whitworth v. Adams*, 5 Rand. (Va.) 333, holding a note made and endorsed for the accommodation of the payee, and put into the hands of a broker by the payee to be sold on the market was not usurious; *Lynchburg v. Norvell*, 20 Gratt. 601, holding the sale of city bonds payable in thirty years with six per cent interest at the rate of two and one half for one for Confederate money when it was rated at twenty to one for gold was usurious; *Watkins v. Taylor*, 2 Munf. 424, 5 Am. Dec. 486 (dissenting opinion), on it being necessary to show a transaction usurious that a loan

was intended and that parties assented to it where it does not appear to be so on its face; *Whitworth v. Adams*, 5 Rand. (Va.) 333 (dissenting opinion), on sufficiency of evidence to establish defense of usury; *McDonald v. Kirkpatrick*, 3 U. C. Q. B. O. S. 324, holding that where the substance of an agreement is in effect a loan of money only the legal rate of interest is chargeable.

— Maritime loans.

Cited in *Atlantic Ins. Co. v. Conard*, 4 Wash. C. C. 662, Fed. Cas. No. 627, holding a respondentia bond given to secure a loan made upon a certain voyage was not void because it was given and the loan made after the vessel sailed.

Cited in note in 70 L.R.A. 365, on what contracts will support maritime lien.

Fictions to cover usury.

Cited in *Lloyd v. Scott*, 4 Cranch, C. C. 206, Fed. Cas. No. 8,434, holding that where an owner of property in consideration of \$5,000, bargained and sold to another an annuity or rent of \$500 in fee chargeable upon the property, with the right of distress, and of entry and eviction in case the rent was in arrear, the buyer covenanting to execute a release for rent after five years upon the payment of \$5000 and all arrears, the transaction was not a loan; *Roux v. Rothschild*, 37 Misc. 435, 75 N. Y. Supp. 763, holding a contract for a loan upon an annuity converted into a sale of an annuity in order to avoid the law might be held void for usury; *Steptoe v. Harvey*, 7 Leigh, 501, holding a contract to take for a loan of one hundred and forty-two shares of bank stock for a year, thirty additional shares, is not void as usurious; *Smith v. Nicholas*, 8 Leigh, 330, holding an agreement by a debtor owning a number of shares of stock to pay for them at the market price or one hundred fifty dollars a share and dividends was usurious.

Note payable on demand as drawing interest from date.

Cited in *Pullen v. Chase*, 4 Ark. 210, holding that under statute giving interest, promissory note payable on demand, draws interest from date.

Substantial construction of contract.

Cited in *Goodyear Shoe Mach. Co. v. Selz*, 51 Ill. App. 390, on how contracts are to be construed; *Schultz v. Winnipeg*, 6 Manitoba L. Rep. 35, on courts as looking to the substance rather than to the words of a contract in the construction thereof.

Cited in note in 18 L.R.A.(N.S.) 982, on effect of agreement to share profits to create partnership.

Unsubstantial technicalities.

Cited in *Roach v. Com.* 1 Yeates, 262, alluding to an expression to illustrate the reluctance of courts to reach a technical result void of substance.

Substantial and colorable risks distinguished.

Referred to as leading case in *Plunkett v. Dillon*, 4 Houst. (Del.) 338, 4 Del. Ch. 198, on the distinction between substantial and colorable risks.

Policy of judicial decisions.

Cited in *Campbell's Case*, 2 Bland, Ch. 209, 20 Am. Dec. 360, on courts as founding their judgments upon consideration of public utility.

Ascertainment of present value of a life interest.

Cited in *Williams' Case*, 3 Bland, Ch. 186, as first alluding to the mode adopted by mathematicians for ascertaining the present value of a life interest of any kind.

Invalidity of wagering contracts on lives.

Cited in *Trenton Mut. L. & F. Ins. Co. v. Johnson*, 24 N. J. L. 576, on wagers on the life of third persons as not being illegal.

Executory devises of real and personal property distinguished.

Cited in *Haines v. Witmer*, 2 Yeates, 400; *Clifton v. Haig*, 4 Desauss. Eq. 330; *Anderson v. Jackson*, 16 Johns. 382, 8 Am. Dec. 330 (dissenting opinion),—as recognizing the distinction between executory devises of real and personal property.

Sufficiency of delivery of personality.

Cited in *Humm v. Bowne*, 2 Caines, 38 (dissenting opinion), on sufficiency of delivery of personality.

Construction of future limitations in wills.

Cited in *Davidson v. Davidson*, 8 N. C. (1 Hawks.) 163, on how limitations over in a will are to be construed.

Oyer where deed is lost.

Cited in *Dehuff v. Turbett*, 3 Yeates, 157, on oyer of a deed not dispensed with though shown to be lost.

Interested testimony.

Cited in *King v. Cohorn*, 6 Yerg. 75, 27 Am. Dec. 455, holding that a party's interest is to be considered in weighing his testimony.

Lenders on security of expectancy.

Cited in *Nevill v. Snelling*, L. R. 15 Ch. Div. 679, 49 L. J. Ch. N. S. 777, 43 L. T. N. S. 244, 29 Week. Rep. 375, alluding to an expression used by advocates describing the nature of defendant's occupations as that of a "person looking out for young men to prey upon."

18 E. R. C. 334, *BAKER v. BRADLEY*, 7 De G. M. & G. 597, 2 Jur. N. S. 98, 25 L. J. Ch. N. S. 7, 4 Week. Rep. 78, reversing the decision of the Vice Chancellor, reported in 1 Jur. N. S. 489, 2 Smale & G. 531, 3 Week. Rep. 361.

Implied fraud in transactions between persons in a fiduciary or confidential relationship.

Cited in *Giers v. Hudson*, 102 Ark. 232, 143 S. W. 916, holding that family settlements will not be interfered with in equity unless strongest reasons are given; *Hix v. Gosling*, 1 Lea, 560; *Gilpin v. Scovil*, 12 N. B. 379; *Barron v. Willis* [1399] 2 Ch. 578, 68 L. J. Ch. N. S. 604, 48 Week. Rep. 26, 81 L. T. N. S. 321, 15 Times L. R. 468; *Holt v. Agnew*, 67 Ala. 360,—on how equity will regard transactions between persons standing in confidential relations.

Cited in note in 26 L.R.A. 53, on contracts procured by threats to prosecute a relative.

—Parent and child.

Cited in *Ewing v. Bass*, 149 Ind. 1, 48 N. E. 241, holding a conveyance by a son without business experience, weak willed and of intemperate habits to his father, of property of the value of fifty thousand dollars in trust to descend to son's legal representatives for a consideration of six hundred dollars was unconscionable; *Clark v. Clark*, 174 Pa. 309, 34 Atl. 610, 38 W. N. C. 57, 26 Pittsb. L. J. N. S. 367; *Herkemeyer v. Kellerman*, 2 Civ. Sup. Ct. Rep. 390, holding a conveyance by a daughter on her coming of age for a sufficient consideration to her mother and step-father, as an adjustment of their rights in property devised to the mother and daughter by the father and on which the step-father had expended money was fair and reasonable.

—Relief in equity.

Cited in *Noble v. Moses*, 81 Ala. 530, 60 Am. Rep. 175, 1 So. 217, holding a daughter was entitled to equitable relief against a mortgage executed by her to secure an indebtedness of her fathers, she entering the transaction at the request of her father without any legal advice; *Ashton v. Thompson*, 32 Minn. 25, 18 N. W. 918, holding equity would relieve against settlements and transfers of property by a young woman just arrived of age to her former guardians while yet under their control and they still in possession of the property; *Powers v. Powers*, 48 How. Pr. 389, setting aside a conveyance by a youth just arrived of age of his share in his father's estate to his mother; *Cox v. Adams*, 35 Can. S. C. 393, holding a wife owning separate property was not liable on a note which she signed as security for a debt of her husband, unwillingly at the urging of husband and without independent advice.

Want of professional advice as affecting validity of transactions in equity.

Cited in *Coffman v. Lookout Bank*, 5 Lea, 232, 40 Am. Rep. 31, holding a note by a father to a bank to take up notes of his upon which the name of the father was forged as an indorser would be cancelled in equity, where no opportunity was given to the father to procure legal advice which the bank already had; *Connelly v. Fisher*, 3 Tenn. Ch. 382, holding equity would relieve against mortgages executed by an illiterate woman to business men, on her homestead, drawn up by their clerk on a form furnished by their lawyers where it authorized the property to be sold free from the homestead right and the equity of redemption.

Acquiescence in or confirmation of an invalid act.

Cited in *Jones v. Calkin*, 16 N. B. 356, on what necessary to constitute an acquiescence in deed which the grantor might have avoided in equity; *Denison v. Denison*, 13 Grant, Ch. (U. C.) 596, holding that illegal transaction of trustee is not ratified by confirmation without full knowledge and capacity.

Laches.

Distinguished in *Dugan v. O'Donnell*, 68 Fed. 983, holding lapse of time would bar the enforcement of a trust where the trustee disavowed the trust and the cestui que trust was aware of his rights.

Equitable relief on other grounds where fraud is not substantiated.

Cited in *Mutual Life Assur. Co. v. Anderson*, 1 N. B. Eq. Rep. 466; *Hoyt v. Sprague*, Fed. Cas. No. 6,810,—on equity as granting relief where charge of fraud not sustained but where bill charges other distinct and substantive grounds of relief.

Restraints on anticipation.

Cited in *Warfield v. Raveries*, 38 Ala. 518, holding that under statute husband's interest in wife's real estate operates as restraint upon her power of alienation, or of present enjoyment by anticipation; *Re Smith*, 51 L. T. N. S. 501, holding a mortgage by a married woman in which her husband joined of the income of an estate held in trust for her benefit was not a valid charge on the income.

Cited in note in 3 E. R. C. 236, on validity of restraint against anticipation.

Cited in 1 Beach, Trusts, 668, on restraints upon anticipation of married women.

18 E. R. C. 358, *HOWARD v. HARRIS*, 1 Vern. 190, 2 Ch. Cas. 147, 1 Vern. 33.

Restrictions of redemption in mortgages as not countenanced in equity.

Cited in *Weathersly v. Weathersly*, 40 Miss. 462, 90 Am. Dec. 344, holding a subsequent agreement that the property should be irredeemable, where conveyance

in effect a mortgage would not take away the equity of redemption; *Hiester v. Maderia*, 3 Watts & S. 384, holding an agreement between the plaintiff and debtor in an execution that the property should be conveyed to plaintiff with a right in defendant to a reconveyance within a specific time constituted a mortgage and defendant might redeem after the expiration of such time; *Greaves v. Gamble*, 1 Legal Gaz. 3, on the point that where an agreement should be construed as a mortgage no language could make the mortgage irredeemable; *Tucker v. Toomer*, 36 Ga. 138; *Elfe v. Cole*, 26 Ga. 197,—on inability of mortgagee to defeat the right of redemption by incorporating an agreement to that effect in mortgage; *Swearingen v. Roberts*, 12 Neb. 333, 11 N. W. 325; *Alexander v. Rodriguez*, Fed. Cas. No. 172; *French v. Lafayette Ins. Co.* 5 McLean, 461, Fed. Cas. No. 5,102; *Gibson v. Hough*, 60 Ga. 588,—on the inability to place restrictions on the right of redemption under a mortgage; *Rands v. Kendall*, 15 Ohio, 671 (dissenting opinion), on the right of redemption as being absolute.

Distinguished in *Hester v. Hester*, 13 Lea, 189, holding a grantor might by mortgage convey to creditor the equity of redemption if not redeemed during life, the beneficiary being shown to be an object of the grantor's bounty; *Stanton v. McKinlay*, 1 U. C. Err. & App. 265, holding where the owner of land conveyed with an agreement that the deed should be null and void if during the life of grantor or within one year thereafter, the sum and interest was repaid, a purchaser of heir of grantor years afterwards could not compel a reconveyance.

Who may redeem from a mortgage.

Cited in *Villa v. Rodriguez* (*Alexander v. Rodriguez*) 12 Wall. 323, 20 L. ed. 406, holding that one who holds a portion of the title by deed from a part of the mortgagor is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest; *Merselis v. Van Riper*, 55 N. J. Eq. 618, 38 Atl. 196, holding that widow may redeem from mortgage for protection of her life estate; *Faulds v. Harper*, 2 Ont. Rep. 405, holding that so long as right of redemption exists in any portion of estate, mortgage must submit to redemption of whole mortgage.

Cited in notes in 24 L. ed. U. S. 910, on who may redeem from the lien of a mortgage; 18 E. R. C. 174, 175, on who may redeem mortgage.

Cited in 2 Washburn, Real Prop. 6th ed. 153, on who may redeem from mortgage.

—When barred.

Cited in *Snively v. Pickle*, 29 Gratt. 27, holding that right to redeem from mortgage may be barred by lapse of time only when mortgagee has been in uninterrupted enjoyment of premises for considerable period.

Terms under which mortgagor may redeem.

Cited in *Dozier v. Mitchell*, 65 Ala. 511, holding that a mortgagor seeking to redeem must pay entire mortgage debt, with lawful interest and charges.

Effect of mortgage given to secure several notes.

Cited in *Andrews v. Hobgood*, 1 Lea, 693; *English v. Carney*, 25 Mich. 178,—holding that mortgage given to secure several notes stands as such even though notes are sold to different parties.

Equitable construction of transaction as mortgage.

Cited in *Bright v. Wagle*, 3 Dana, 252, holding in equity where the evidence shows a loan and a conveyance to secure it, it will be treated as a mortgage; *Dungan v. Mutual Ben. L. Ins. Co.* 46 Md. 469, holding that any agreement showing that parties intended assignment of policy of insurance as security consti-

tuted assignment of mortgage; *Eaton v. Whiting*, 3 Pick. 484, holding a conveyance of land on conditions that if the debt due from the grantor to the grantee should be paid in a certain time the deed should be void with a power to sell in case of debt not paid, constituted a mortgage; *Newton v. Fay*, 10 Allen, 505, holding equity would allow the redemption of shares of stock conveyed by an instrument absolute in terms on proof that the transfer was made only as collateral security for a debt; *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638, holding a conveyance in the form of a deed of trust to secure the payment of a note, with right in trustee to sell on failure to pay or upon payment to reconvey was in effect a mortgage.

Mortgage, deed, or conditional sale.

Cited in *Swift v. Swift*, 36 Ala. 147, holding that instrument reciting that defendant had purchased from complainant several slaves, and stipulating that complainant might redeem at decreased price said slaves within 7 years was conditional sale; *Tufts v. Lapley*, 129 Mass. 380, holding that failure to pay amount agreed upon, will put end to contract for reconveyance where, sale was absolute on face; *Floyd v. Harrison*, 2 Rob. (Va.) 161 (dissenting opinion), on construction of instrument as deed or mortgage; *Peterkin v. McFarlane*, 9 Ont. App. Rep. 429, holding that contemporaneous agreement to reconvey at named price, does not constitute mortgage.

Cited in note in 18 E. R. C. 11, on test between mortgage and conditional sale.

Admissibility of parol evidence.

Cited in *Mathews v. Holmes*, C. R. 2 A. C. 230, on admissibility of parol evidence in cases of accident, fraud, or mistake, to qualify and correct, and even defeat the term of written instruments.

—To show that deed absolute is a mortgage.

Cited in *McCarron v. Cassidy*, 18 Ark. 34; *Maffitt v. Rynd*, 69 Pa. 380; *Holton v. Meigher*, 15 Minn. 69, Gil. 50; *Walker v. McDonald*, 49 Tex. 458; *Hinkley v. Wheelwright*, 29 Md. 341,—holding that parol evidence is admissible to show that deed absolute is mortgage.

Relationship and rights of mortgagor and mortgagee.

Cited in *Hicks v. Hicks*, 5 Gill & J. 75, on what essential to creation of relationship of mortgagor and mortgagee.

Cited in note in 18 E. R. C. 369, on mortgagee's right to obtain collateral or additional advancement from necessities of mortgagor.

Once a mortgage, always a mortgage.

Cited in *Random v. Swartz*, 1 Yeates, 579, approving the rule that an estate could not be a mortgage at one time and absolute purchase at another; *Clark v. Henry*, 2 Cow. 324, on an agreement changing a mortgage into an absolute deed as not countenanced in equity; *Stewart v. Horton*, 2 Grant, Ch. (U. C.) 45, holding that what is once a mortgage must always remain mortgage, and that any restrictions on equity of redemption are void.

Allowance of interest on interest.

Cited in *Connecticut v. Jackson*, 1 Johns. Ch. 13, 7 Am. Dec. 471, holding that as general rule interest upon interest is not allowed; *Stewart v. Martin*, 2 Watts, 200, holding if interest payable annually and secured by a recognizance be not paid, interest may be recovered upon the annual payments as they become due; *Hammond v. Hammond*, 2 Bland, Ch. 306, on the illegality of contract for compound interest.

18 E. R. C. 366, *JENNINGS v. WARD*, 2 Vern. 520.

Restrictions on right of redemption from mortgage.

Cited in *Winton v. Mott*, 4 Luzerne Leg. Reg. 71, holding that the equity of redemption may not be clogged by any by-agreement; *Stewart v. Horton*, 2 Grant, Ch. (U. C.) 45, holding that restrictions on equity of redemption, in mortgage is void; *Fallon v. Keenan*, 12 Grant, Ch. (U. C.) 389, holding a stipulation in a mortgage for the purchase of the property by the mortgagee at a stipulated sum in case of default on part of mortgagor is invalid; *Rands v. Kendall*, 15 Ohio, 671 (dissenting opinion); *Bentley v. Phelps*, 2 Woodb. & M. 426, Fed. Cas. No. 1,331; *Elfe v. Cole*, 26 Cal. 197,—on right of redemption as not subject to defeat by the incorporation of an agreement to that effect in the mortgage.

Setting aside releases of equity of redemption.

Cited in *Perkins v. Drye*, 3 Dana, 170, holding equity would set aside a contract whereby a mortgagor released his equity of redemption, where the consideration for such release was grossly inadequate.

Cited in 2 Washburn, Real Prop. 6th ed. 55, on relief against agreement limiting right to redeem.

Who may redeem.

Cited in *Hiester v. Maderia*, 3 Watts & S. 384, holding that where deed in fee, is redeemable by grantor, or heir male of his body, general heir may redeem.

Agreements for collateral advantages to mortgagee.

Cited in *James v. Kerr*, L. R. 40 Ch. Div. 449, 58 L. J. Ch. N. S. 355, 60 L. T. N. S. 212, 37 Week. Rep. 279, 53 J. P. 628, holding an agreement in a mortgage executed as security for a loan that if the borrower was successful in his undertaking to pay an additional bonus in addition to interest was illegal; *Phillips v. Prout*, 12 Manitoba L. Rep. 143, on bonus or special commissions on a mortgage loan when allowed; *Field v. Hopkins*, L. R. 44 Ch. Div. 524, 62 L. T. N. S. 774, on the allowance of collateral advantages to the mortgagee; *Santley v. Wilde* [1899] 1 Ch. 747, 68 L. J. Ch. N. S. 681, 47 Week. Rep. 297, 80 L. T. N. S. 154, 15 Times L. R. 190, reversed in [1899] 2 Ch. 474, 68 L. J. Ch. N. S. 681, 48 Week. Rep. 90, 81 L. T. N. S. 393, 15 Times L. R. 528, on the allowance of stipulations by mortgagee for a collateral advantage.

Distinguished in *Biggs v. Hoddinott* [1898] 2 Ch. 307, 67 L. J. Ch. N. S. 540, 79 L. T. N. S. 201, 17 Times L. R. 504, 47 Week. Rep. 84, holding a provision in a mortgage of a hotel to a brewer that the mortgagors would during the continuance of the security deal with mortgagee exclusively for beer and malt liquor sold on the premises was valid; *Carritt v. Bradley* [1901] 2 K. B. 550, 70 L. J. K. B. N. S. 832, 49 Week. Rep. 593, 85 L. T. N. S. 197, 17 Times L. R. 641, holding a provision of a mortgage executed for an advance of money that the mortgagor would secure mortgagee employment as broker for company in which mortgagor was interested was valid.

18 E. R. C. 369, *CASBORNE v. SCARFE*, 1 Atk. 603, 2 Eq. Cas. Abr. 728 pl. 6.

Equity of redemption as an estate in land.

Cited in *Ballard v. Carter*, 5 Pick. 112, 16 Am. Dec. 377, holding that mortgage held by testator before making of will and until his decease, will pass under residuary devise of "all his estate, whether real or personal;" *Waters v. Stewart*, 1 Cai. Cas. 47, holding an equity of redemption may be sold by the sheriff under an execution on fieri facias; *De Beek v. Canada Permanent Loan & Sav. Co.* 12 B. C. 409, holding the equity of redemption was an estate in land:

Fletcher v. Rodden, 1 Ont. Rep. 155, holding that equity of redemption is estate in land and person entitled to it is in equity owner of land; *Chisholm v. Sheldon*, 2 Grant, Ch. (U. C.) 178; *Sheldon v. Chisholm*, 3 Grant, Ch. (U. C.) 655; *Simpson v. Smyth*, 2 U. C. Q. B. O. S. 625, 1 U. C. Err. & App. 172; *Grant v. Jackson & S. Co.* 5 Del. Ch. 404,—on equity of redemption as being an estate in land; *Stark v. Chatham*, 2 Tenn. Ch. 300, on an equity of redemption as descending by inheritance; *Smyth v. Simpson*: C. R. 1 A. C. 335, on nature of equity of redemption.

Cited in note in 18 E. R. C. 164, on equity in redemption as estate in land.

—Dower or curtesy.

Cited in *Robertson v. Robertson*, 25 Grant, Ch. (U. C.) 486; *Fish v. Fish*, 1 Conn. 559,—holding the widow of a deceased mortgagor is entitled to dower in an equity of redemption; *Barker v. Parker*, 17 Mass. 564, holding a widow of deceased mortgagor was entitled to dower in equity of redemption as against purchasers thereof on execution although she had released her dower where the mortgage was paid by a stranger before entry made under the purchase; *Verree v. Verree*, 2 Brev. 211, holding the widow of a mortgagor where the mortgage was given before the marriage was not entitled to dower in the land.

Cited in note in 20 L.R.A.(N.S.) 454, on curtesy in equity of redemption.

Cited in 2 Beach, Trusts, 965, on dower in trust estate.

Seisin of equitable estate.

Cited in *Bernards Twp. v. Warren Twp.* 15 N. J. L. 447, on what constitutes a seisin of an equitable estate.

Nature of mortgagor's interest in realty.

Cited in *Brown v. Snell*, 6 Fla. 741, holding until condition broken and foreclosure had the mortgagor may maintain ejectment to recover possession of the mortgaged premises; *Fiedler v. Carpenter*, 2 Woodb. & M. 211, Fed. Cas. No. 4,759; *Trimm v. Marsh*, 54 N. Y. 599, 13 Am. Rep. 623 (dissenting opinion).—on the interest of a mortgagor in land; *Cameron v. Walker*, 19 Ont. Rep. 212, holding that when owner of land under decree of foreclosure takes proceedings to recover possession of land he seeks possession of that which by title newly accrued has for first time became his own property.

Cited in note in 18 E. R. C. 6, on essential character of a mortgage.

Cited in 2 Washburn, Real Prop. 6th ed. 89, on mortgagee's estate at common law.

Mortgagee's interest.

Cited in *Hampton v. State*, 67 Ark. 266, 54 S. W. 746, holding the recording of a mortgage was unnecessary to the creation of a mortgage lien it being that in nature; *Wilkins v. French*, 20 Me. 111; *Colton v. Depew*, 59 N. J. Eq. 126, 44 Atl. 662; *Rands v. Kendall*, 15 Ohio, 671 (dissenting opinion); *Elfe v. Cole*, 26 Ga. 197,—on nature of mortgagee's interest in realty before foreclosure; *Demarest v. Wynkoop*, 3 Johns. Ch. 129, 8 Am. Dec. 467, on mortgagee interest before foreclosure of the mortgage as being a chattel interest; *Lawrence v. Savannah*, 71 Ga. 392, holding the right reserved by a city conveying a lot with a right to re-enter and sell on condition broken was only a pledge or security for the debt; *Grable v. McCullon*, 27 Ind. 472, holding the interest created in mortgagee by a mortgage of land was merely a lien; *Kinna v. Smith*, 3 N. J. Eq. 14, holding an assignment of a mortgage before foreclosure was properly made by the executrix being a chattel interest; *Witherell v. Wiberg*, 4 Sawy. 232, Fed. Cas. No. 17,917, holding a mortgagee before foreclosure had no right to take possession of the mortgaged premises to secure the satisfaction of the debt; *Heath v.*

Pugh, 16 E. R. C. 377, L. R. 6 Q. B. Div. 345, 50 L. J. Q. B. N. S. 473, 44 L. T. N. S. 327, 29 Week. Rep. 904, holding the beneficial title to mortgaged land vested for the first time in the mortgagee on the making of an order of foreclosure absolute; Vowell v. Thompson, 3 Cranch, C. C. 428, Fed. Cas. No. 17,023; Ordway v. Farrow, 79 Vt. 192, 118 Am. St. Rep. 951, 64 Atl. 1116,—on possession by mortgagee as being in trust for mortgagor; Todd v. Cameron, 2 U. C. Err. & App. 434, holding mortgagee of a term was liable for rent accruing during the existence of a mortgage held by assignee of the reversion.

Cited in 2 Washburn, Real Prop. 6th ed. 124, on mortgages going to personal representatives as personal assets.

Effect of devise of mortgage.

Cited in Cogdell v. Widow, 3 Dessauss. Eq. 346, on the legal estate in mortgaged premises as not passing by a general residuary devise by the mortgagee.

Cited in 2 Washburn, Real Prop. 6th ed. 122, 123, as to how far a devise of land affects a mortgage thereon.

Distinguished in Ballard v. Carter, 5 Pick. 112, 16 Am. Dec. 377, holding a mortgage held by a testator before the making of his will and until his decease would pass under a devise of "all his estate whether real or personal."

Laches against right to redeem from a mortgage.

Cited in Fogal v. Pirro, 17 Abb. Pr. 113, 10 Bosw. 100, on the running of the statute of limitations against right to redeem from a mortgage.

Lands and estates subject to right of curtesy.

Cited in McDaniel v. Grace, 15 Ark. 465, holding a husband had no right of curtesy in a pre-emption right of the wife in the public lands of the United States; Chew v. Southwark, 5 Rawle, 160, holding a mere naked seisin of the freehold by the wife as trustee, will not support a tenancy by curtesy though she has the beneficial interest in the reversion; Davis v. Mason, 1 Pet. 503, 7 L. ed. 239, on right of curtesy as existing in trust estates.

Curtesy tenant's liability for charges falling on the estate.

Cited in Pennock v. Imbrie, 3 Phila. 140, 15 Phila. Leg. Int. 140, holding the representatives of a man who had purchased a mortgage on his wife's freehold of which he was in possession, could not recover interest for the time he was in possession; Latimer v. Moore, 4 McLean, 110, Fed. Cas. No. 8,114, on tenant by curtesy as liable to keep down interest.

Effect of coverture upon running of statute of limitations.

Cited in Fogal v. Pirro, 10 Bosw. 100, holding that coverture of heir at law will prevent statute of limitation from running against action of ejectment.

Mortgage as revocation of will.

Cited in 2 Washburn, Real Prop. 6th ed. 140, on mortgage as revocation of will.

18 E. R. C. 382, EX PARTE WILSON, 13 Revised Rep. 75, 1 Rose, 444, 2 Ves. & B. 252.

Right of mortgagee to recover rents from mortgagor.

Cited in Johnson v. Miller, Wilson Super. Ct. (Ind.) 416; Gordon v. Lewis, 2 Sumn. 143, Fed. Cas. No. 5,613; Doe ex dem. Duval v. McLoskey, 1 Ala. 708,—on right of mortgagee to recover rents of mortgagor; Boyce v. Boyce, 6 Rich. 302, on liability of mortgagor to account to mortgagee for rents; Chambers v. Mauldin, 4 Ala. 477, holding the grantor of slaves conveyed as security for a debt was not liable for their hire for the time they remained in his possession

with permission of grantee; *Silverman v. Northwestern Mut. L. Ins. Co.* 5 Ill. App. 124, holding a mortgagee is not entitled to recover rent from mortgagor in possession accruing after the commencement of proceedings to foreclose and before mortgagee entitled to possession under the decree; *Renard v. Brown*, 7 Neb. 449, holding that mortgagor is not required to account for rents and profits while he is in possession; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420, holding mortgagee not entitled to rents before actual possession although mortgagor covenants to surrender premises on default and then refuses to do so; *Re Bennett*, 2 Hughes, 156, Fed. Cas. No. 1,313, holding mortgagors not accountable for rents and profits received by them from tenants before entry made or notice given.

Cited in note in 18 E. R. C. 411, on mortgagee's right to rents.

18 E. R. C. 385, *EYRE v. HUGHES*, L. R. 2 Ch. Div. 148, 45 L. J. Ch. N. S. 395, 34 L. T. N. S. 211, 24 Week. Rep. 597.

Commissions and allowances to mortgagee.

Cited in *Freehold Loan Co. v. McLean*, 9 Manitoba L. Rep. 15, holding mortgagee not entitled to an allowance for personal trouble in receiving rents.

Cited in note in 18 E. R. C. 368, on mortgagee's right to obtain collateral or additional advancement from necessities of mortgagor.

Mortgage for costs and expenses.

Cited in *Locking v. Halsted*, 16 Ont. Rep. 32, holding a mortgage taken by a solicitor to cover costs was a valid security for no more than actually expended when the power of sale under, exercised.

Recovery of interest on money expended on improvements of an estate of another.

Cited in *Fawcett v. Burwell*, 27 Grant, Ch. (U. C.) 445, holding plaintiff who enhanced the value of his wife's property of which he believed she was the owner in fee when she had but a life estate under a will discovered after her death, was entitled to interest on the money expended on improvements.

Defence by way of counter claim.

Cited in *McKay v. O'Neil*, 22 N. S. 346, holding in an action on a promissory note it was not necessary for defendants to counterclaim a defence of an agreement to insure the vessel for which the money was secured to fit out.

Accounting between mortgagor and mortgagee.

Cited in note in 18 E. R. C. 429, 430, on liability to account of mortgagee entering into possession for receipt of rents and profits.

Distinguished in *Jones v. Linton*, 44 L. T. N. S. 601, holding a mortgagor was entitled to an accounting as against a mortgagee who entered into possession before there was any interest in arrears.

18 E. R. C. 404, *MOSS v. GALLIMORE*, 1 Dougl. K. B. 279.

Rights of mortgagee to rents and profits under prior lease.

Cited in *Mansony v. United States Bank*, 4 Ala. 735; *Chambers v. Mauldin*, 4 Ala. 477,—holding mortgagee entitled, upon notice to tenant, to all rents in arrear at time of notice or accruing thereafter; *King v. Housatonic R. Co.* 45 Conn. 226, holding mortgagee, after notice, entitled to all rents due or accruing from date of mortgage, but not for rents in arrear at time mortgage was executed; *Scheidt v. Belz*, 4 Ill. App. 431, holding that mortgagee of reversion after attornment may sue for and collect rents accruing thereafter; *Baldwin v. Walker*,

21 Conn. 168, on same point; *Hutchinson v. Dearing*, 20 Ala. 798; *Russell v. Allen*, 2 Allen, 42; *Cavis v. McClary*, 5 N. H. 529,—holding mortgagee entitled to rents accruing after notice to tenant of his claim to such rents, where the lease was executed prior to the mortgage; *Kimball v. Pike*, 18 N. H. 419, holding that an assignment of the reversion by deed or mortgage carries with it right to rents under a lease executed prior to such assignment; *Kinnear v. Aspden*, 19 Ont. App. Rep. 468, holding mortgagee entitled to arrears of rent due under a lease prior to his mortgage, upon giving notice to the tenant; *Abbott v. Hanson*, 24 N. J. L. 493, holding that lessor cannot maintain action for rent under a lease where he has subsequently conveyed the premises in fee to another though such conveyance was secretly intended as a mortgage; *Mayo v. Shattuck*, 14 Pick. 525, holding that mortgagee cannot maintain trespass against lessee of mortgagor holding over after condition broken; *Stedman v. Gassett*, 18 Vt. 346, holding tenant not liable to mortgagor for rent of mortgaged premises after notice from mortgagee that the latter claims such rents; *Matthews v. Preston*, 6 Rich. Eq. (note) 307, on outstanding leases passing to mortgagee under mortgage.

Cited in note in 18 E. R. C. 411, on mortgagee's right to rent.

— Under subsequent lease.

Cited in *Doe ex dem. Brown v. Mace*, 7 Blackf. 2, holding mortgagee entitled to possession of mortgaged premises from mortgagor or his tenant under lease subsequent to the mortgage without any notice to quit; *Lane v. King*, 8 Wend. 584, 24 Am. Dec. 105, holding lessee of mortgagor under lease executed subsequent to the mortgage, not entitled to crops growing on mortgaged premises at time of foreclosure.

Distinguished in *Cullen v. Minnesota Loan & T. Co.* 60 Minn. 46, 61 N. W. 818, holding mortgagee entitled to rents to be applied to payment of insurance and taxes but not to payment of the mortgage debt, under statute where lease was subsequent to the mortgage; *Price v. Smith*, 2 N. J. Eq. 516, holding mortgagee not entitled to collect rents from tenant accruing under a lease from mortgagor executed subsequent to the mortgage.

— Distress by mortgagee.

Distinguished in *Souders v. Vansickle*, 8 N. J. L. 313; *McKircher v. Hawley*, 16 Johns. 289,—holding that mortgagee cannot distrain for rent accruing upon a lease executed by the mortgagor while in possession and subsequent to the mortgage.

Effect of notice to tenant of mortgaged property.

Cited in *Clark v. Abbott*, 1 Md. Ch. 474, holding that mortgagee having given notice to tenants holding mortgaged premises is entitled to receive rents in arrears at time of notice; *Souders v. Vansickle*, 8 N. J. L. 313, holding that tenant under lease made prior to mortgage may be sued or distrained upon by mortgagee for rent after notice not to pay to landlord; *Parker v. McIlwain*, 17 Ont. Pr. Rep. 84, holding that no mere notice from mortgagee to tenant of mortgaged property will be sufficient to require payment of rent to mortgagee.

Recognition of mortgagee by tenant by payment of rent.

Cited in *Sanderson v. Price*, 21 N. J. L. 637 (dissenting opinion), on right of tenant to recognize title of mortgagee of premises by paying rent to him.

Right of assignee of lease to rent.

Cited in *Morris v. Niles*, 12 Abb. Pr. 103, holding that assignee of lease is entitled to rent accruing after assignment.

Right to rents where mortgagor is in possession.

Cited in *Eastern Trust & Bkg. Co. v. American Ice Co.* 14 App. D. C. 304, holding mortgagor in possession entitled to rents and profits until dispossessed; *Silverman v. Northwestern Mut. L. Ins. Co.* 5 Ill. App. 124, holding mortgagor in possession not accountable for rents and profits accruing before decree of foreclosure though subsequent to default; *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420, holding mortgagee not entitled to rents and profits where mortgagor is in possession; *Childs v. Hurd*, 32 W. Va. 66, 9 S. E. 362, holding the same though the mortgaged estate was a leasehold; *Loring v. Bartlett*, 4 App. D. C. 1; *Coolidge v. Melvin*, 42 N. H. 510,—on mortgagor in possession as tenant of the mortgagee; *Matthie v. Rose*, 9 U. C. Q. B. 602, holding that mortgagor in possession is not liable for rent.

Cited in 1 *Underhill, Land. & T.* 29, on right of mortgagor to possession and to rents.

Distinguished in *Ex parte Wilson*, 18 E. R. C. 382, 2 Ves. & B. 252, 13 Revised Rep. 75, 1 Rose, 444, holding mortgagee not entitled to an accounting for rents paid to the mortgagor though his security proves insufficient where no notice had been given to the tenant as to payment of rents.

— Effect of default or forfeiture.

Cited in *Re Bennett*, 2 Hughes, 156, Fed. Cas. No. 1,313, holding that recovery of possession by mortgagee from mortgagor in ejectment carries with it right to mesne profits from time of notice by mortgagee to quit or from commencement of action; *Coker v. Pearsall*, 6 Ala. 542, holding that upon the forfeiture of a mortgage, the mortgagee becomes entitled to all rents in arrears at that time or accruing subsequently; *Barron v. Whiteside*, 89 Md. 448, 43 Atl. 825, holding mortgagee entitled to rents and profits upon demand after default and before sale, and may recover rents paid to mortgagor's assignee subsequent to such notice; *Stewart v. Fry*, 3 Ala. 53, holding mortgagees not entitled to an accounting of rents and profits received by mortgagor prior to default and notice to tenant.

Rights of mortgagor and assignee of equity of redemption as to rent.

Cited in *Gilmour v. Roe*, 21 Grant, Ch. (U. C.) 284, holding mortgagor cannot to injury of assignee of equity of redemption receive rent from tenant of mortgaged premises in advance.

Title of mortgagee.

Cited in *Frazier v. Gates*, 61 Ill. 180, on relationship between mortgagee and mortgagor, where latter is left in possession; *Wolff v. Farrell*, 3 Brev. 68, 1 Treadway Const. 151, holding that mortgagee may maintain trover to recover possession of mortgaged chattel from a third person, though possession thereof had not been taken by such mortgagee.

Cited in 2 *Washburn, Real Prop.* 6th ed. 119, on mortgagee of leased premises as assignee of the reversion.

— Relation to lease hold tenant.

Cited in *Delaney v. Fox*, 15 E. R. C. 299, 26 L. J. C. P. N. S. 248-250, 2 C. B. N. S. 768, on tenant paying rent to mortgagee as being the tenant of the latter.

— Mortgagor as tenant.

Cited in *Willis v. Eastern Trust & Bkg. Co.* 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347, holding that a mortgagor in possession is not a tenant at will of the mortgagee so as to permit the latter to recover possession by summary process under the landlord and tenant act; *Larned v. Clarke*, 8 Cush.

29, holding statutory remedies available as between landlord and tenant cannot be resorted to by a lessee from the mortgagee to recover possession from mortgagor; *Chapman v. Armistead*, 4 Munf. 382, holding that possession of mortgagor after mortgage is given, is that of the mortgagee and is transferred by a conveyance by the latter; *Cummings v. Kilpatrick*, 23 Miss. 106, on mortgagor in possession after condition broken as being a tenant by sufferance; *Principles & Authorities*, 4 N. C. (1 Car. Law Repos. 442), on a mortgagor being like a tenant at will; *Waterman v. Matteson*, 4 R. I. 539, on mortgagor in possession not being a tenant at will of the mortgagee; *Craft v. Webster*, 4 Rawle, 242, on mortgagor having the actual estate in the property mortgaged in equity; *Doe ex dem. Munro v. Hanson*, 1 N. B. 375, on the point that a mortgagor left in possession is only a tenant at will.

Title of mortgagor.

Cited in *Waters v. Stewart*, 1 Cai. Cas. 47, holding that an equity of redemption may be sold under an execution at law; *Talbot's Appeal*, 2 Walk. (Pa.) 67 (affirming 2 Chester Co. Rep. 57), holding that a mortgagor cannot be considered as a trespasser until after entry by the mortgagee.

Tenant's liability for rent where title has passed from landlord.

Cited in *George v. Putney*, 4 Cush. 351, 50 Am. Dec. 788, holding tenant not liable to his lessor for rent where a judgment creditor levied upon the premises and claimed the rent from the tenant; *Moffat v. Strong*, 9 Bosw. 57, holding that eviction by paramount title as to part of premises leased is a good defense by tenant in action for accrued rent.

Liability of lessee to grantee of reversion.

Cited in *Birch v. Wright*, 15 E. R. C. 626, 1 T. R. 378-388, 1 Revised Rep. 223, holding that where landlord conveys leased premises, the tenant is liable to the new owner for rent after notice of the conveyance.

Attornment.

Cited in *Fleming v. Tilford*, 7 Phila. 301, holding that attornment follows assignment by landlord by operation of law; consent of tenant is not necessary; *Vance v. Johnson*, 10 Humph. 214, holding that grantor in deed of trust may set up title or possession adverse to the trustee and may attorn to another whereby possession is changed and statute of limitations begins to run; *Castleman v. Belt*, 2 B. Mon. 157, on attornment as being unnecessary under statute; *Burden v. Thayer*, 3 Met. 76, 37 Am. Dec. 117, on statute as having done away with the necessity of attornment by tenant in case of conveyance of the reversion; *Jones v. Rigby*, 41 Minn. 530, 43 N. W. 390, holding rule as to attornment by tenant not to be in force in Minnesota.

Meaning of "arrears."

Cited in *Wiggin v. Knights of Pythias*, 31 Fed. 122, on "in arrears" as always meaning past due.

Conveyance fraudulent under bankruptcy law.

Cited in *Hobbs v. Bibb*, 2 Stew. (Ala.) 54, on conveyances fraudulent under bankruptcy laws.

18 E. R. C. 411, *PARKINSON v. HANBURY*, L. R. 2 H. L. 1, 16 L. T. N. S. 243, 15 Week. Rep. 642, affirming the decision of the Lords Justices, reported in 2 De G. J. & S. 450, which affirms the decision of the Vice Chancellor, reported in 1 Drew. & S. 143.

Accountable items between mortgagee in possession and mortgagor.

Cited in *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25, holding that mortgagee

purchasing the mortgaged premises at tax sale should have the amount so paid out allowed him in the accounting with his comortgagees and mortgagor.

Distinguished in *Romanes v. Hems*, 22 Grant, Ch. (U. C.) 469, holding mortgagee in possession not entitled to recover for improvements not necessary to the preservation of the estate, though such improvements increased the value of the property; *Comyns v. Comyns*, Ir. Rep. 5 Eq. 583, holding mortgagee in possession, upon accounting, not entitled to sum for managing the property, though such sum was stipulated by proviso in the mortgage.

The decision of the Lord Justices was cited in *Ten Eyck v. Craig*, 62 N. Y. 406 (affirming 2 Hun, 452), holding that a mortgagee in possession may purchase at execution sale against mortgagor and set up such title against the mortgagor.

The decision of the Vice Chancellor was distinguished in *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*, L. R. 6 Ind. App. 145, holding mortgagor entitled to subtenures acquired by mortgagee, upon payment to the latter of the mortgage debt and the cost to him of such subtenures.

—Rents and profits.

Cited in *Ten Eyck v. Craig*, 2 Hun, 452, holding that mortgagee not in possession has no right to demand or receive rents and profits.

Distinguished in *Re M'Kinley*, Ir. Rep. 7 Eq. 467, holding that a mortgagee who went into possession of mortgaged property under a power of attorney between himself and the mortgagor executed subsequently to the mortgage is liable to an accounting for rents and profits as a mortgagee in possession.

—As to rents or profits not diligently realized.

Cited in *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083, holding mortgagee in possession liable for such rents and profits as might have been received with good management.

—Mortgagee in possession in another right.

Cited in *Morris v. Budlong*, 78 N. Y. 543; *McKibbin v. Williams*, 24 Ont. App. Rep. 122,—holding that a mortgagee, though in possession is not liable as such where his possession was not taken under the mortgage; *Gaskell v. Gosling* [1896] 1 Q. B. 669, on same point.

Rights of mortgagee after mortgage is due.

Cited in *Down v. Lee*, 4 Manitoba L. Rep. 177, holding that after mortgage is due, mortgagee may treat mortgagor either as tenant or trespasser.

Accountability of possessor or lienor for rents and profits and proceeds.

Cited in *Lockhart v. Gee*, 3 Tenn. Ch. 332, holding that a party having a receiver of property improperly appointed will be liable for the cost of the receivership and for the rents and profits received by such receiver; *Bell v. Fraser*, 12 Ont. App. Rep. 1, holding creditor of estate not liable to trustee for failure of a broker to account for timber sold, though such timber had been assigned to the creditor as security for his claim.

Allowances for improvements to land.

Cited in *Shaw v. Thomas*, 19 Grant, Ch. (U. C.) 489, on right of one in possession in belief that he is the owner, to recover for improvements; *Beaty v. Shaw*, 14 Ont. App. Rep. 600, holding that purchaser of land subject to a mortgage, has no lien for his improvements as against the mortgagee, though he believed the mortgage was discharged.

Title of purchaser at sale under power in mortgage.

Cited in *Selwyn v. Graft*, L. R. 38 Ch. Div. 273, 57 L. J. Ch. N. S. 609, 59

L. T. N. S. 233, 36 Week. Rep. 513, on question whether purchaser under power of sale in mortgage is protected where he knows of an irregularity but it is one which might have been waived.

Cited in note in 18 Eng. Rul. Cas. 447, on ability of mortgagee under power of sale to make a good title to the purchaser.

The decision of the Vice Chancellor was cited in *Swinny v. Rodburn*, 27 N. B. 175, holding that clause in power of sale relieving purchaser from responsibility for improper notice, does not give such purchaser good title where he had actual knowledge that proper notice was not given; *Kirkwood v. Thompson*, 34 L. J. Ch. N. S. 395, 2 Hem. & M. 392, 11 Jur. N. S. 385; *Shaw v. Bunny*, 34 L. J. Ch. N. S. 257, 2 De G. J. & S. 468, 11 Jur. N. S. 99, 11 L. T. N. S. 645, 13 Week. Rep. 374,—holding that where second mortgagee purchases bona fide under a power of sale duly exercised by a first mortgagee, he obtains an irredeemable title the same as though he were a stranger; *Bailey v. Barnes* [1894] 1 Ch. 25, 63 L. J. Ch. N. S. 93, 7 Reports, 9, 69 L. T. N. S. 542, 42 Week. Rep. 66, 18 Eng. Rul. Cas. 510, on title of purchaser under power of sale in mortgage deed where purchaser has no notice of irregularity in the execution of such power.

The decision of the Vice Chancellor was distinguished in *Re Martin & Merritt*, 3 Ont. L. Rep. 284, holding that in action between a subsequent mortgagee and a purchaser from him, the validity of the sale under power in prior mortgage through which the mortgagor had title, cannot be questioned where regular on its face.

Opening a settled account.

Cited in *Whyte v. Ahrens*, L. R. 26 Ch. Div. 723, 54 L. J. Ch. N. S. 145, 50 L. T. N. S. 344, 32 Week. Rep. 649; *Leitch v. Abbott*, L. R. 31 Ch. Div. 374, 55 L. J. Ch. N. S. 460, 54 L. T. N. S. 258, 34 Week. Rep. 506, 50 J. P. 441,—holding that in order to open a settled account specific errors in the account must be stated.

The decision of the Lords Justices was cited in note in 29 L.R.A.(N.S.) 345, on effect of retaining statement of account to render it an account stated.

Defendant's right to particulars.

Cited in *Clark v. Hamilton*, 5 Terr. L. R. 178, holding that in action to open account, it is necessary to particularize specific errors in account; *Sachs v. Spielman*, L. R. 37 Ch. Div. 295, 57 L. J. Ch. N. S. 658, 58 L. T. N. S. 102, 36 Week. Rep. 498, holding that delivering his statement of defense is not a waiver of defendant's right to particulars.

Right of litigant to be heard in person.

Cited in *Re North Victoria Election*, 39 U. C. Q. B. 147, on a party not having a right to be heard where he has already been heard through counsel.

18 E. R. C. 434, *LOCKHART v. HARDY*, 9 Beav. 349, 10 Jur. 532, 15 L. J. Ch. N. S. 347.

Recovery of deficiency on debt or suit on covenant after foreclosure of mortgage.

Cited in *Allison v. McDonald*, 23 Can. S. C. 635, holding that mortgagee cannot sue on mortgagor's personal covenant after he has put it out of his power to return the mortgage property; *McLellan v. Maitland*, 3 Grant, Ch. (U. C.) 164, holding right to sue on personal covenant and right to redeem to be reciprocal; *Gowland v. Garbutt*, 13 Grant, Ch. (U. C.) 578, holding that mortgagee cannot sue on covenant in the mortgage after he has sold and conveyed part of the

mortgaged premises to another; *Munsen v. Hauss*, 22 Grant, Ch. (U. C.) 279, holding mortgagee not deprived of right to sue on the covenant though he had mortgaged the premises after foreclosure, but had subsequently paid off such mortgage; *Parkinson v. Higgins*, 37 U. C. Q. B. 308, on right of mortgagee to sue on covenant where he has purchased the mortgagor's interest at a sale under another lien; *Forster v. Ivey*, 2 Ont. L. Rep. 480 (dissenting opinion), on mortgagee not having right to sue on mortgagor's personal covenant if he is unable to restore the mortgaged estate.

Distinguished in *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52, holding that where bonds secured by mortgage and also a contract of guarantee, are taken as security for a debt, the guaranty may be enforced though the mortgage has been foreclosed; *Crotty v. Taylor*, 8 Manitoba L. Rep. 188, holding that mortgagee who has bona fide exercised a power of sale in mortgage deed may nevertheless sue the mortgagor upon his covenant for the deficiency; *Kenny v. Chisholm*, 19 N. S. 497, holding that where mortgagee purchases at sale under decree of foreclosure and then conveys to a third party he is not debarred from recovering deficiency in suit on mortgagor's collateral bond; *Trust & L. Co. v. McKenzie*, 23 Ont. App. Rep. 167, holding mortgagor not released from liability on his personal covenant though mortgagee agreed with purchaser of the premises to extend the time of payment of the mortgage; *Miller v. McCuaig*, 6 Manitoba L. Rep. 539; *Mendels v. Gibson*, 9 Ont. L. Rep. 94,—holding that mortgagee may sue on mortgagor's personal covenant where he is in position to return the entire mortgaged estate though not in the condition it was when he took possession; *Parkinson v. Higgins*, 40 U. C. Q. B. 274, holding mortgagee not debarred from suing on mortgagor's personal covenant where mortgagee purchased vessel at sale under lien for wages, and vessel was lost while in his possession.

—Reopening foreclosure by action or payment.

Cited in *Paisley v. Broddy*, 11 Ont. Pr. Rep. 202, holding that suing upon covenant in a mortgage after foreclosure opens the foreclosure; *Cotton v. Corby*, 7 Grant, Ch. (U. C.) 50, on same point; *Covert v. Bank of Upper Canada*, 3 Grant, Ch. (U. C.) 246, on effect of suit for foreclosure of mortgage, if prosecuted to final order for foreclosure upon right to proceeds of collaterals held by third person, thus opening the foreclosure proceedings; *Kinnaird v. Trollope*, L. R. 39 Ch. Div. 636, 57 L. J. Ch. N. S. 905, 59 L. T. N. S. 433, 37 Week. Rep. 234, holding that where mortgagee sues a mortgagor who has absolutely assigned his equity of redemption, the latter acquires a new right to redeem upon the payment of the amount due; *Smith v. McLandress*, 26 Grant, Ch. (U. C.) 17, on mortgagee's receiving payments on the mortgage debt after foreclosure as opening the foreclosure.

Cited in 2 Washburn, Real Prop. 6th ed. 220, on mortgagee opening redemption by action to recover alleged balance.

Sale under foreclosure as conveyance.

Cited in *Huntington v. Inland Revenue Comrs.* [1896] 1 Q. B. 422, 65 L. J. Q. B. N. S. 297, 74 L. T. N. S. 28, 44 Week. Rep. 300, holding that a conveyance ordered under mortgage foreclosure is a conveyance within the meaning of the stamp act.

Waiver of foreclosure by suing for debt.

Cited in 2 Washburn, Real Prop. 6th ed. 138, on waiver of foreclosure by suing for debt.

Effect of release of part of mortgaged premises.

Cited in *Trust & Loan Co. v. Boulton*, 18 Grant, Ch. (U. C.) 234, holding that

release of part of mortgaged premises from first mortgage which contained a power of sale would, as between first and second mortgage, postpone first to second to such extent only.

Right of mortgagee to sue for mortgage debt where unable to restore property.

Cited in *Parkinson v. Higgins*, 40 U. C. Q. B. 274, on the point that if the mortgagee has put it out of his power to restore the property mortgaged, equity will not permit him to sue for the mortgage money.

Loss of equitable remedy by equitable mortgagee.

Cited in *Newkirk v. Stees*, 3 Sask. L. R. 3, to the point that equitable mortgagee, without power of sale may disentitle himself from equitable remedy by use of securities.

Devisee of real estate as having rights of an heir.

Cited in 2 *Washburn*, Real Prop. 6th ed. 177, on devisee of real estate as position of an heir as far as calling upon an executor or administrator to discharge the mortgage upon the real out of the personal estate.

Discharge of surety where creditor negligently loses security.

Cited in 1 *Brandt*, Suretyship, 3d ed. 935, on discharge of surety where creditor negligently loses security for the debt.

18 E. R. C. 442, *CORDER v. MORGAN*, 18 Ves. Jr. 344.

Sale under power of sale in mortgage.

Cited in *Longwith v. Butler*, 8 Ill. 32, holding that mortgagee under mortgage containing power of sale may sell and convey good title to a purchaser; *Gates v. Jacob*, 1 B. Mon. 306, holding that sale by mortgagee under power granted in mortgage conveys an irredeemable title in the purchaser; *Clark v. Condit*, 18 N. J. Eq. 358, holding that sale of mortgaged premises by mortgagee under power granted in the mortgage is valid; *Sampson v. Williamson*, 6 Tex. 102, 55 Am. Dec. 762, on validity of power of sale in mortgage.

Cited in 2 *Beach*, Trusts, 1442, on origin and character of powers of sale in mortgage or deed of trust; 1 *Devlin*, Deeds, 3d ed. 685, on death of mortgagor as not revoking power of sale; 2 *Beach*, Trusts, 1460, on revocation or suspension of power of sale in mortgage or deed of trust; 2 *Washburn*, Real Prop. 6th ed. 62, on necessity for mortgagor joining in conveyance executed under power of sale.

Distinguished in *Lawrence v. Farmers' Loan & T. Co.* 13 N. Y. 200, holding that sale under power in mortgage must be at public auction as prescribed by statute though the power in the mortgage expressly authorizes private sale

—Specific enforcement.

Cited in *Hood v. Adams*, 124 Mass. 481, 26 Am. Rep. 687; *Atkins v. Atkins*, 195 Mass. 124, 11 L.R.A. (N.S.) 273, 122 Am. St. Rep. 221, 80 N. E. 806,—on right of mortgagee to enforce specific performance of sale under power contained in mortgage.

Parties to suit for specific performance of contract.

Cited in *Pomeroy*, Spec. Perf. 2d ed. 545, on parties to suit for specific performance of contract.

18 E. R. C. 452, *WARNER v. JACOB*, L. R. 20 Ch. Div. 220, 51 L. J. Ch. N. S. 642, 46 L. T. N. S. 656, 30 Week. Rep. 731.

Validity of sale under power in mortgage.

Cited in *Re Shore*, 6 Manitoba, L. Rep. 305, holding private sale without adver-

tising valid where power authorizes sale either "by public auction or private contract;" *Parsons v. Ryan*, N. F. (1884-96) 655, holding that purchaser at mortgage sale is bound to see that terms of sale fell within limits of power; *Kelly v. Imperial Loan & Invest Co.* 11 Ont. App. Rep. 526, holding sale valid where made in good faith as authorized by the power, though the sale did not purport to be made in the exercise of the power; *Kennedy v. De Trafford* [1896] 1 Ch. 762, 65 L. J. Ch. N. S. 465, 74 L. T. N. S. 599, 44 Week. Rep. 454, holding that under power of sale in mortgage the mortgagee may sell to one co-mortgagor without notice to or consent of the others provided such sale is made in the bona fide exercise of the power; *Martinson v. Clowes*, L. R. 21 Ch. Div. 857, 51 L. J. Ch. N. S. 594, 46 L. T. N. S. 882, 30 Week. Rep. 795, holding sale under power void as against mortgagor where the mortgagee was a society and the purchaser was its secretary.

Cited in 2 *Beach, Trusts*, 1467, on injunction against sale under power in mortgage or deed of trust.

—Deficient price.

Cited in *Chatfield v. Cunningham*, 23 Ont. Rep. 153, holding sale under power valid even though mortgagee might be liable in damages in account of inadequacy of price.

Liability of mortgagee in respect of sale made under power.

Cited in *Morton v. Hamilton Provident & L. Soc.* 10 Ont. Pr. Rep. 636, holding that the claim of a mortgagor for surplus in hands of mortgagee after sale is a proper subject for equitable relief; *Beatty v. O'Connor*, 5 Ont. Rep. 747, on liability of mortgagee for surplus received at sale under power in mortgage; *Ishitaka v. British Columbia Land & Invest. Agency*, 16 B. C. 299; *Huson v. Haddington Island Quarry Co.* 16 B. C. 98,—to the point that mortgagee is not, strictly speaking, a trustee of the power of sale; *Ingalls v. McLaurin*, 11 Ont. Rep. 380, holding that mortgagee may be regarded as trustee for mortgagor.

—Inadequacy of price or realization.

Cited in *Daniels v. Noxon*, 17 Ont. App. Rep. 206, holding mortgagee not liable for loss where he sold mortgaged stock but took no proceedings to enforce the sale and the stock fell in value; *Colson v. Williams*, 58 L. J. Ch. N. S. 539, 61 L. T. N. S. 71; *Farrar v. Farrars*, L. R. 40 Ch. Div. 395, 58 L. J. Ch. N. S. 185, 60 L. T. N. S. 121, 37 Week. Rep. 196,—holding that where mortgagee acts bona fide in selling under power, the mortgagor has no redress though more might have been realized had the sale been postponed; *Carruthers v. Hamilton Provident & L. Soc.* 12 Manitoba L. Rep. 60, holding mortgagee liable to mortgagor for inadequacy of price obtained at sale under mortgage where the sale was not properly advertised; *Aldrich v. Canada Permanent Loan & Sav. Co.* 24 Ont. App. Rep. 193, holding mortgagee liable for smaller price obtained where he sold a farm and two shops in a village some distance away, as one parcel instead of selling separately.

Distinguished in *Prentice v. Consolidated Bank*, 13 Ont. App. Rep. 69, holding mortgagee liable in damages for failure to exercise proper care and adopt means to get the best price reasonably obtainable.

18 E. R. C. 458, *TANNER v. HEARD*, 23 Beav. 555, 3 Jur. N. S. 427, 5 Week. Rep. 420.

Mortgagee as trustee of surplus proceeds of sale.

Cited in *Banner v. Berridge*, L. R. 18 Ch. Div. 254, 50 L. J. Ch. N. S. 630, 44 L. T. N. S. 680, 29 Week. Rep. 844, 4 Asp. Mar. L. Cas. 420, holding that mort-

gagee is not an express trustee of surplus received from sale of mortgaged property.

18 E. R. C. 462, *BURT v. BULL*, 64 L. J. Q. B. N. S. 232, 71 L. T. N. S. 810, 2 Manson, 94, [1895] 1 Q. B. 276, 14 Reports, 65, 43 Week. Rep. 180.

Nature of office of a receiver.

Cited in *Sovereign Bank v. Parsons*, 18 Ont. L. Rep. 665, holding that receiver of corporation is not its agent.

Liability of a trustee upon contracts.

Cited in *Wells-Stone Mercantile Co. v. Grover*, 7 N. D. 460, 41 L.R.A. 252, 75 N. W. 911, holding that trustee is himself personally liable on all contracts made by him as trustee.

— Of executor.

Cited in note in 12 E. R. C. 43, 44, on personal liability of executor carrying on trade with funds of testator.

18 E. R. C. 474, *DICKENSON v. HARRISON*, 4 Price, 282, 18 Revised Rep. 711.

Principal and interest as independent debts.

Cited in *Hammond v. Hammond*, 2 Bland, Ch. 306, holding that separate action cannot be brought for interest where whole sum principal and interest is due and payable; *R. ex rel. Atty. Gen. v. Grand Trunk R. Co.* 2 Can. Exch. 132, holding that where a sum of money is payable with interest at a certain fixed day, interest cannot be collected thereon after that day under the contract, but only as damages; *Union Invest. Co. v. Wells*, 39 Can. S. C. 625, 11 Ann. Cas. 33 (affirmed in *C. R.* (1906) A. C. 497), holding that where interest is made payable periodically, the note does not become "over due" by default in the payment of an instalment of interest; *Moore v. Scott*, 16 Manitoba L. Rep. 492, holding that one who takes a note with interest over due and unpaid is not a holder in due course without notice; *Harvey v. McPherson*, 6 Ont. L. Rep. 60, holding that a separate action may be maintained on a note though it had been included in a lump sum with other notes and accounts in proving a claim against an insolvent.

Disapproved in *McDonald v. Dowdall*, 28 Ont. Rep. 212, holding that plaintiff could not sue for the interest on a deposit as separate from the principal where he had treated the deposit receipt as calling for the principal and interest.

Splitting up of cause of action.

Cited in *Welch v. Stewart*, 2 Bland, Ch. 37, holding that plaintiff cannot be permitted to split up and multiply his causes of action.

18 E. R. C. 481, *BALFE v. LORD*, 1 Connor & L. 519, 2 Drury & War. 480, 4 Ir. Eq. Rep. 648.

Mortgagees remedies.

Cited in *Shepard v. Richardson*, 145 Mass. 32, 11 N. E. 738, holding that the usual remedies will be presumed unless the instrument itself provides otherwise; *Hall v. Sullivan R. Co.* Brunner, Cal. Cas. 613, Fed. Cas. No. 5,948, on right to foreclose being incident to all mortgages except Welsh mortgages.

What constitutes a mortgage.

Cited in *Credit Foncier Franco-Canadien v. Andrew*, 9 Manitoba, L. Rep. 65, holding that instrument given as security for money is presumed to be mortgage.

What constitutes a foreclosure.

Cited in *Cornwall v. Henriod*, 12 Grant, Ch. (U. C.) 338, holding that although

that bill does not pray redemption but decree for redemption is issued upon it, subsequent dismissal of bill operates as foreclosure.

Necessary parties to action to redeem or foreclose.

Cited in note in 18 E. R. C. 496, on necessity of making all persons interested in mortgage security or in equity of redemption parties to action to redeem or foreclose.

Waiver of objection by answer.

Cited in *Schultz v. Alloway*, 10 Manitoba L. Rep. 221, holding that objection that no taxes were in arrears at time of sale may be waived by answer.

18 E. R. C. 491, *PALMER v. CARLISLE*, 1 Sim. & Stu. 423.

Parties to foreclosure.

Cited in *Wilson v. Hayward*, 2 Fla. 27, holding that where a mortgage secures several notes in the hands of different parties, a foreclosure at the instance of one bars foreclosure by the others; *Shirkey v. Hanna*, 3 Blackf. 403, 26 Am. Dec. 426, holding that a joint mortgage to two persons to secure debts due to them severally, may be foreclosed on a joint bill by the mortgagees; *Webster v. Vandevanter*, 6 Gray, 428, holding that one joint tenant cannot alone maintain writ of entry to foreclose a mortgage; *Pettibone v. Edwards*, 15 Wis. 95, holding that in action to foreclose a mortgage for default in the payment of the last of three notes secured by it, the holder of the second note, which is unpaid, is a necessary party; *Re Continental Oxygen Co.* [1897] 1 Ch. 511, 66 L. J. Ch. N. S. 273, 76 L. T. N. S. 229, 45 Week. Rep. 313, holding that foreclosure of mortgage debentures will not be ordered where one of the debenture holders is not before the court; *Cochran v. Goodell*, 131 Mass. 464, holding that mortgagees holding separate mortgages given at the same time to secure separate obligations, may join as plaintiffs in action to foreclose.

Cited in note in 37 L.R.A. 741, on proceedings to enforce mortgage for part of mortgage debt.

Distinguished in *Brooks v. Vermont C. R. Co.* 14 Blatchf. 463, Fed. Cas. No. 1,964, holding that foreclosure by holders of some mortgage bonds will not bar foreclosure by holders of other bonds which are distinct and separate.

Parties to redemption.

Cited in *Miller v. Finn*, 1 Neb. 254, holding that in an action to redeem each person holding any part of the property must be brought in as a party; *Davis v. Duffie*, 18 Abb. Pr. 360, holding that grantees of mortgagee, in possession, are necessary parties to action to redeem; *McLellan v. Maitland*, 3 Grant, Ch. (U. C.) 164, on partial redemption as not being proper where all the parties are not before the court.

18 E. R. C. 497, *PARKER v. HOUSEFIELD*, 4 L. J. Ch. N. S. 57, 2 Myl. & K. 419.

Right to time to redeem from mortgage before foreclosure.

Cited in *Jones v. Betsworth*, 3 Bland, Ch. 194, on allowance of further time to redeem after decree of foreclosure; *Meller v. Woods*, 5 L. J. Ch. N. S. 109, 1 Keen, 16, holding mortgagor under equitable mortgage entitled to the usual time to redeem though the debt bore no interest to compensate the mortgagee for the delay.

Equitable mortgages.

Cited in *Carey v. Doyme*, 5 Ir. Ch. Rep. 104, on equitable mortgage by deposit of title deeds.

—Foreclosure.

Distinguished in *Re Owen* [1894] 3 Ch. 220, 63 L. J. Ch. N. S. 749, 8 Reports, 566, 71 L. T. N. S. 181, 43 Week. Rep. 55, holding that a person having an equitable charge upon an interest in land, created by will, has no remedy by foreclosure.

18 E. R. C. 502, *DETILLIN v. GALE*, 6 Revised Rep. 192, 7 Ves. Jr. 583.

—Liability for costs of foreclosure.

Cited in *House v. Eisenlord*, 30 Hun, 90, holding that question of costs in foreclosure proceedings rests in the discretion of the court; *Mackie v. Cairns*, 5 Cow. 547, 15 Am. Dec. 477, holding that subsequent incumbrancers brought in, in foreclosure proceedings are entitled to their costs out of the mortgage fund; *Archdeacon v. Bowes*, 13 Price, 353, 28 Revised Rep. 685, McClel. 149, on mortgagee as being *prima facie* entitled to his costs.

—In action to redeem.

Cited in *National Provincial Bank v. Games*, L. R. 31 Ch. Div. 582, 55 L. J. Ch. N. S. 576, 54 L. T. N. S. 696, 34 Week. Rep. 600, holding mortgagees entitled to all costs properly incurred in respect to their position as mortgagees, but this would not include costs of investigating mortgagor's title; *Wales v. Carr* [1902] 1 Ch. 860, 71 L. J. Ch. N. S. 483, 50 Week. Rep. 313, 86 L. T. N. S. 288, holding that mortgagee's solicitors costs in negotiating the loan and preparing the mortgage deed, cannot be charged against the security as costs upon redemption by a second mortgagee; *Brockway v. Wells*, 1 Paige, 617, on costs in action to redeem.

Disapproved in *Saunders v. Frost*, 5 Pick. 259, 16 Am. Dec. 394, holding mortgagee not entitled to costs in suit to redeem where such action was made necessary by his unjust actions.

—Against mortgagee for misconduct or vexation.

Cited in *McNeil v. Call*, 19 N. H. 402, 51 Am. Dec. 188, holding mortgagee liable to costs of action to redeem where his action had been unconscientious and oppressive; *Bean v. Brackett*, 35 N. H. 88, holding mortgagee liable for costs where mortgagor had sought an accounting of rents and profits which was refused and in action therefor the mortgage was found fully satisfied; *Brown v. Simons*, 45 N. H. 211, holding mortgagee liable for costs where tender of amount due him had been made prior to the action and he also set up a defense which was not available to him; *Lozeau v. Shields*, 23 N. J. Eq. 509, holding costs of redemption suit properly taxed against mortgagee where his vexatious and unjust conduct makes such taxation equitable; *Le Targe v. De Tuyll*, 3 Grant, Ch. (U. C.) 595; *Souter v. Burnham*, 10 Grant, Ch. (U. C.) 375,—holding mortgagee liable for entire costs of litigation where his misconduct was the sole cause thereof; *Dryden v. Frost*, 8 L. J. Ch. N. S. 235, 3 Myl. & C. 670, 2 Jur. 1030, holding equitable mortgagee not entitled to the costs of an unsuccessful attempt to defend an action at law for the recovery of the premises; *Harvey v. Tebbutt*, 1 Jac. & W. 197, 21 Revised Rep. 145, holding mortgagee liable for costs occasioned by his resisting the right to redemption where such resistance was not justified; *Coneklin v. Coddington*, 12 N. J. Eq. 250, 72 Am. Dec. 393, holding mortgagee entitled to his costs in foreclosure proceeding by second mortgagee, though the former set up his claim as being greater than the court allowed him; *Livingston v. Bank of New Brunswick*, 11 N. B. 252, holding each party liable to pay his own costs where the litigation was chargeable to the faults of both.

18 E. R. C. 508, *BRISTOL v. HUNGERFORD*, 2 Vern. 524, 1 Eq. Cas. Abr. 142; pl. 5.

Priority in time between equal equities.

Referred to as leading case in *Newell v. Morgan*, 2 Harr. (Del.) 225, on judgment creditors preferred out of equitable estates by reason of their legal priority.

Cited in *Berry v. Mutual Ins. Co.* 2 Johns. Ch. 603, holding that equitable interests effecting an estate attach according to priority of time, being equal in other respects.

Cited in notes in 18 E. R. C. 527, on priority of mortgagee acquiring legal estate; 21 E. R. C. 744, on protection of purchaser for value without notice.

18 E. R. C. 510, *BAILEY v. BARNES* [1894] 1 Ch. 25, 63 L. J. Ch. N. S. 73, 69 L. T. N. S. 542, 7 Reports, 9, 42 Week. Rep. 66.

Constructive notice.

Cited in *Williams v. Sun Life Assur. Co.* 16 B. C. 370, holding that one may not be bound by constructive notice when lapse of time and conduct of parties induced change of condition; *Re Martin & Merritt*, 3 Ont. L. Rep. 284, holding that where mortgage contains clause "no want of notice or publication when required shall invalidate any sale hereunder but vendors alone shall be responsible," it does not protect a purchaser under a power of sale against defects of which he has notice; *Freeman v. Laing* [1899] 2 Ch. 355, 68 L. J. Ch. N. S. 586, 48 Week. Rep. 9, 81 L. T. N. S. 167, on imputed notice; *Re White & S. Contract* [1896] 1 Ch. 637, holding that where particulars of auction sale contained no statements as to covenants nor notice that lease might be inspected at solicitor's office the purchaser could not be charged with constructive notice of covenants of the lease.

Cited in note in 21 E. R. C. 162, on purchaser being affected with constructive notice of all facts which would have been discovered by requiring usual title.

— Facts challenging inquiry.

Cited in *Moore v. Kane*, 24 Ont. Rep. 541, holding that the nature of the transaction did not put vendee upon inquiry so as to affect him with constructive notice; *McKillop v. Alexander*, 45 Can. S. C. 551, 1 D. L. R. 586 (dissenting opinion), on legal obligation of purchaser to investigate vendor's title; *Taylor v. London & C. Bkg. Co.* [1901] 2 Ch. 231, 70 L. J. Ch. N. S. 477, 49 Week. Rep. 451, 84 L. T. N. S. 397, 17 Times L. R. 413, on business prudence as test for duty to inquire.

— As to irregular power of sale.

Cited in *Life Interest & R. Securities Corp. v. Hand-in-Hand F. & L. Ins. Soc.* [1898] 2 Ch. 230, 67 L. J. Ch. N. S. 548, 78 L. T. N. S. 708, 46 Week. Rep. 668, on constructive notice of purchaser as to irregularity of exercise of power of sale.

Cited in note in 18 E. R. C. 447, on ability of mortgagee under power of sale to make a good title to the purchaser.

Effect of notice.

Cited in *Vancouver Lumber Co. v. Vancouver*, 15 B. C. 432, holding that purchaser of interest in lands with notice of prior equities takes subject thereto.

Effect upon mortgagor's right of irregular sale of property by mortgagee.

Cited in *Williams v. Sun Life Assur. Co.* 4 D. L. R. 655, holding that mortgagor who consents to abandonment of foreclosure proceedings and sale of property by mortgagee without court order, cannot, four years later, have sale set aside.

Right to reinforce equitable with legal title.

Cited in *Re Scott & A. Contract* [1895] 1 Ch. 596, holding that where title has been derived through a sale which was a breach of trust the doctrine that where equities are equal he who obtains the legal title will prevail, does not apply.

Cited in notes in 10 E. R. C. 568, on legal title prevailing where equities are equal; 21 E. R. C. 744-746, on protection of purchaser for value without notice.

18 E. R. C. 523, *MARSH v. LEE*, 2 Vent. 337, 1 White & T. Lead. Cas. 856 & note.

Priority between equities.

Cited in *Siter v. McClanachan*, 2 Gratt. 280, holding that where grantors of a trust for their own use subsequently give a deed and mortgage to same property, such mortgagee's rights are superior to those of holder of notes made to and assigned by trustee.

Cited in note in 18 E. R. C. 522, 523, on priority between mortgages.

Equities dependent on priority in time or legal right.

Cited in *Merchants' Bank v. Morrison*, 19 Grant, Ch. (U. C.) 1 (reversing 18 Grant, Ch. 382), holding that where land supposed to be covered by two successive mortgages was omitted and actions by both mortgagees to rectify were brought, the first mortgage with respect to the land omitted is prior even though a decree of rectification was first obtained by second mortgagee; *Newman v. Chapman*, 2 Rand. (Va.) 93, 14 Am. Dec. 766, holding that a subsequent purchaser for valuable consideration without actual notice is not prejudiced by pending action of foreclosure where mortgage is not duly of record; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263, on tacking a subsequent incumbrance on to an incumbrance senior to one intervening by purchase of the senior making the subsequent prior to intervening incumbrance were in case of pendency of foreclosure on intervening incumbrance.

Tacking to equal or inferior equity.

Cited in *Hopkinson v. Rolt*, 3 E. R. C. 523, 9 H. L. Cas. 514, 34 L. J. Ch. N. S. 468, on the right of the first mortgagee to tack subsequent advances, made without notice, so as to exclude an intermediate mortgagee.

—Junior and senior liens and mortgages.

Cited in *Osborn v. Carr*, 12 Conn. 195, on the equality of second and third mortgages where the third mortgagee was without notice and acted bona fide, and on priority of the rights of mortgagee that acquired legal title; *Parsons v. Welles*, 17 Mass. 419, holding that where senior mortgagee obtains the title on condition broken his rights are superior to those of junior bona fide mortgagee without notice.

Constructive notice.

Cited in *Warford v. Hankins*, 150 Ind. 489, 50 N. E. 468, holding that lien reserved in deed conveying land is notice to subsequent mortgagee of rights of those claiming under such lien.

Rights of purchaser without notice.

Cited in *Merchants' Bank v. Morrison*, 18 Grant, Ch. (U. C.) 382, holding that one who obtains equity without notice of former equity has equal equity with holder of former equity.

Cited in note in 21 E. R. C. 744, on protection of purchaser for value without notice.

18 E. R. C. 531, *IBBOTTSON v. RHODES*, 2 Vern. 554, 1 Eq. Cas. Abr. 321, pl. 6

Forfeiture of title, rights or priority by misrepresentation or concealment.

Cited in *Broome v. Beers*, 6 Conn. 198, holding that where a prior mortgagee represented that his mortgage was concurrent to that of another, he will be precluded from claiming his actual priority in foreclosure against the other; *Nickerson v. Massachusetts Title Ins. Co.* 178 Mass. 308, 59 N. E. 814, on forfeiture of priority by refusal to disclose incumbrance; *Quirk v. Thomas*, 6 Mich. 76, holding that where land is purchased from supposed grantee, on discovery of mistake showing that grantee never had title the grantor may not set up as against subsequent purchaser that sale to his grantee was in fraud of creditors; *Greenway v. Greer*, 5 Humph. 26, holding that to charge the beneficiary under a trust deed with fraud so as to vitiate the lien of the deed it must be shown that at time he represented its non-existence the representation was to be relied upon and a purchase caused thereby; *Stuart v. Luddington*, 1 Rand. (Va.) 403, 10 Am. Dec. 550, holding that where in a boundary dispute one party yields his opinion, such act will not bar his actual rights appearing later unless his yielding was based on fraud; *Engle v. Burns*, 5 Call (Va.) 463, 2 Am. Dec. 593, holding where the owner of land stands by and sees it sold to another person and remains silent he forfeits his rights.

Distinguished in *Morrison v. Morrison*, 2 Dana. 13, in that an incumbrancer need not gratify idle curiosity, the inquirer not stating that he was about to advance money on premises.

Presumptive notice of defects in title disclosed by recital in any deed essential to title.

Cited in *Chew v. Calvert*, Walk. (Miss.) 54, holding that purchaser is presumed to have notice of every defect, disclosed by any recital in any deed essential to his title.

Answer in chancery as evidence at law.

Cited in *Kinsey v. Grimes*, 7 Blackf. 290, on the reading of answer in evidence not being permissible unless by direction of equity court because a party may not make evidence for himself; *Sturtevant v. Waterbury*, 1 Edw. Ch. 442, holding that defendant may have the benefit of having his answer in a feigned issue read in evidence; *Littell v. M'Iver*, 1 Bibb, 203, on answer as evidence unless denied by more than one witness.

18 E. R. C. 535, *HOOD v. PHILLIPS*, 3 Beav. 513. Proceedings to enforce costs. 6 Beav. 176.

Merger controlled by intent.

Cited in *Macdonald v. Bullivant*, 10 Ont. App. Rep. 582, holding that where mortgagee obtains assignment of equity of redemption to his wife expressly to prevent merger and sued on the mortgage, there is not a merger; *North of Scotland Mortg. Co. v. Udell*, 46 U. C. Q. B. 511, on presumption of merger in absence of intention to contrary or explanatory circumstances; *Barker v. Eccles*, 18 Grant. Ch. (U. C.) 440, holding that, where with notice of a second mortgage a first mortgage is purchased with the equity of redemption and a mortgage given back to assignor of mortgage, a payment of new mortgage will not merge it into the equity it being conveyed subject to mortgage.

Cited in 2 Beach, Trusts, 978, on merger of legal and equitable estates.

—Trust rebutting merger.

Distinguished in *Re Nunn*, Ir. L. R. 23 Eq. 286, holding that where estate and

charge became vested in devisor by payment of charges with money subject to a trust, such charges subsist only to extent of trust.

— Presumption as to intent.

Cited in *Bradford v. Burgess*, 20 R. I. 290, 38 Atl. 975, holding that when the mortgagee purchased mortgaged premises the mortgage merged into the title acquired by purchase: *Re Tasker* [1905] 2 Ch. 587, 74 L. J. Ch. N. S. 643, 54 Week. Rep. 65, 93 L. T. N. S. 195, 21 Times L. R. 736, 12 Manson, 302, holding that to keep alive a paid-off mortgage as against subsequent encumbrances, the intention so to do must be clearly and unequivocally expressed.

Distinguished in *St. John's Cathedral v. MacArthur*, 9 Manitoba L. Rep. 391, on cited case as being one of satisfaction as distinguished from merger.

Right of mortgagee to sue for deficiency.

Cited in *Crotty v. Taylor*, 8 Manitoba L. Rep. 188, holding that mortgagee, after having exercised power of sale may proceed to enforce payment of any deficiency.

18 E. R. C. 540, *BURRELL v. EGREMONT*, 7 Beav. 205, 8 Jur. 587, 13 L. J. Ch. N. S. 309.

Merger of charge in estate.

Cited in *Smith v. Smith, Jr.* L. R. 19 Eq. 514, holding that where tenant for life with general power of appointment becomes possessed of a charge on the estate it does not merge contrary to intention of tenant.

Presumption in favor of life tenant paying charges.

Cited in *Barnum v. Barnum*, 42 Md. 251, holding that a tenant for life is not bound to pay off charge against estate but that if he does it is presumed that he did so for his own benefit and such charge subsists; *Currie v. Currie*, 20 Ont. L. Rep. 375, holding that tenant for life who pays off charge on inheritance is *prima facie* entitled to that charge for his own benefit; *Carrick v. Smith*, 34 U. C. Q. B. 389, holding that a dowress is in same position as a life tenant and any payment of the principal of a charge against estate becomes a lien thereon in her favor.

Cited in note in 29 L.R.A.(N.S.) 155, on right of life tenant paying off liens or encumbrances.

Cited in 2 Devlin, *Deeds*, 3d ed. 2453, on merger of estates not being presumed where life tenant pays encumbrance.

— On charge payable and receivable by same person.

Cited in *Lombard v. Hickson*, 13 Ir. Ch. Rep. 98, holding that where the same person to pay renewal fine is the one to receive such payment it will be presumed that such renewal has been made.

Distinguished in *Spickernell v. Hotham*, 1 Kay, 669, 2 Week. Rep. 639, holding that where trust fund never exists it cannot be assumed that a payment by beneficiary of interest on a charge against the estate is to payment to himself, he owing the charge.

— Rebuttal by evidence of intent.

Cited in *Amroy v. Lowell*, 1 Allen, 504, holding that where rents from entailed estate are used to pay off charges against the property the holders of entailed estate are entitled to reimbursement where the intent is not to discharge the estate: *Re Harvey* [1896] 1 Ch. 137, 65 L. J. Ch. N. S. 370, 73 L. T. N. S. 613, 44 Week. Rep. 242, holding that where mother as life tenant pays charge against estate the remainder of which is in her children, the presumption that she does so for her own benefit is not rebutted by the relation of parent

and child; *Gifford v. Fitzhardinge* [1899] 2 Ch. 32, 68 L. J. Ch. N. S. 529, 81 L. T. N. S. 106, 47 Week. Rep. 618, holding that where mortgage is paid off intended for benefit of person paying he having equity of redemption such intention will control notwithstanding form or nature of payment.

Rights of payer of charge or lien on another's estate.

Cited in *St. John's Cathedral v. MacArthur*, 9 Manitoba L. Rep. 391, holding that where through mistake a mortgage was discharged it was held not to merge but to subsist as against subsequent incumbrances; *Patten v. Bond*, 60 L. T. N. S. 583, 37 Week. Rep. 373, holding that where one having no interest in the equity of redemption pays money on a mortgage, on subsequent full payment of mortgage by owner of equity, the mortgage will subsist as a charge to extent of first mentioned payment; *Kensington v. Bouverie*, 29 L. J. Ch. N. S. 537, 7 H. L. Cas. 537, 6 Jur. N. S. 105, holding that where life tenant paid interest on charge partly from his own funds the rents not being sufficient, the amount of such deficiency is not chargeable against the estate since he did not notify remainderman thereof.

Limitations or laches against charge or subrogation thereto.

Cited in *Topham v. Booth*, L. R. 35 Ch. Div. 607, 56 L. J. Ch. N. S. 812, 57 L. T. N. S. 170, 35 Week. Rep. 715, holding that where beneficiary under a trust is bound to pay interest on a charge there on receivable by her trustees the statutes of limitations does not apply; *Re Grady*, 13 Ir. Ch. Rep. 154, on the non-application of statute of limitations based on presumption that payment has been made where payor and payee are same person; *Carbery v. Preston*, 13 Ir. Eq. Rep. 455, holding that it will be presumed that successive life tenant paid interest on charge from date when charge vested in each although twenty years had elapsed before vesting and that the charge was not barred by statute of limitations.

Distinguished in *Re Allen* [1898] 2 Ch. 499, 67 L. J. Ch. N. S. 614, 79 L. T. N. S. 107, 47 Week. Rep. 55, holding where life tenant is under no obligation to pay interest on charge on the estate and no such payment was made, the statute of limitations was not prevented from running against right of residuary legatees to hold specific devisee's contribution on the charge; *Re England* [1895] 2 Ch. 100, holding that where land devised to tenant in fee subject to a charge and no payment on interest has been made on charge, it cannot be presumed that payments have been made on grounds of duty to keep down interest, so as to prevent statute of limitations from running in favor of personal estate of deviser.

Statute of limitations as affected where same person represents conflicting claims.

Cited in *Bremer v. Williams*, 210 Mass. 256, 96 N. E. 687, holding that where one person represents both sides of conflicting claims, statute of limitations does not run.

18 E. R. C. 552, *THORNE v. CANN* [1895] A. C. 11, 64 L. J. Ch. N. S. 1, 71 L. T. N. S. 852, 11 Reports, 67.

Merger of mortgage and equity of redemption in one person.

Cited in *DeBury v. DeBury*, 2 N. B. Eq. 348; *Reeves v. Konschur*, 2 Sask. L. R. 125,—holding that where owner of equity of redemption takes assignment of mortgage and circumstances show intention to keep it alive mortgage is not

extinguished; *Armstrong v. Lye*, 27 Ont. App. Rep. 287, on relaxation of rule of merger of charge in estate.

Cited in note in 17 Eng. Rul. Cas. 389, on merger of charges in freehold.

—Intention as test.

Cited in *DeBury v. DeBury*, 36 N. B. 57 (affirming 2 N. B. Eq. Rep. 348); *Thellusson v. Liddard* [1900] 2 Ch. 635, 69 L. J. Ch. N. S. 673, 82 L. T. N. S. 753, 49 Week. Rep. 10,—holding that where one holding a term is vested with the reversion, the two estates do not merge where the parties dealt with each other on the footing that they inured separately and questioning whether merger of legal estates is controlled by intention.

—Presumptions.

Cited in *Liquidation Estates Purchase Co. v. Willoughby* [1896] 1 Ch. 726, 65 L. J. Ch. N. S. 486, 74 L. T. N. S. 228, 44 Week. Rep. 612, holding that where one pays off a charge for which he is not liable and receives an assignment of it, if it is to his interest that the security be kept alive, it will be presumed that such was his intention; *Re Tasker* [1905] 2 Ch. 587, 74 L. J. Ch. N. S. 643, 54 Week. Rep. 65, 93 L. T. N. S. 195, 21 Times L. R. 736, 12 Manson, 302, holding that where a company issued debentures as security for a loan, and subsequently paid the loan and received back the debentures, the value of the debentures as security is extinguished.

Distinguished in *The Ripon City* [1898] P. 78, 8 Asp. Mar. L. Cas. 391, 67 L. J. Prob. N. S. 30, 78 L. T. N. S. 296, 14 Times L. R. 219, 46 Week. Rep. 586, holding that where in an action in rem for liens against a ship, the owners gave bail for her release it will not be presumed that their intention was to keep the liens alive.

—Where other claims would be let in.

Cited in *Re Major*, 5 B. C. 244, holding presumption against intent to merge where other liens would be let in; *Thompson v. Thompson*, 37 N. S. 242, holding mortgage would be kept on foot notwithstanding release of equity of redemption to mortgagee, where wife refused to join in release and her dower would otherwise be let in; *Capital & C. Bank v. Rhodes* [1903] 1 Ch. 631, 72 L. J. Ch. N. S. 336, 88 L. T. N. S. 255, 51 Week. Rep. 470, 19 Times L. R. 280, 71 L. J. Ch. N. S. 573, 87 L. T. N. S. 17, holding that where one as “beneficial owner” demises his interest and later the fee vests him which he mortgages to another, the beneficial interest and the fee do not merge.

18 E. R. C. 564, *HARRISON v. OWEN*, 1 Atk. 520.

Necessity of reconveyance to revest estate in mortgagor.

Cited in *Stewart v. Crosby*, 50 Me. 130, holding that payment by mortgagor after condition broken does not revest title in mortgagor but conveyance from mortgagee is necessary; *Doe ex dem. Munro v. Hanson*, 1 N. B. 375, on necessity of reconveyance.

Cited in 1 Devlin, *Deeds*, 3d ed. 525, on deed once executed and delivered being irrevocable.

Distinguished in *Simons v. Bryce*, 10 S. C. 354, holding that under the statute the mortgagor is not divested of the legal title to the land.

Necessity of deed to pass vested estate.

Cited in *Chessman v. Whittemore*, 23 Pick. 231, holding that one is not divested of his estate though he destroy or invalidate the deed by material alteration; *Wilson v. Hill*, 13 N. J. Eq. 143, holding that where lands were deeded

to a feme covert she cannot be divested of them by a cancelation of her unrecorded deed and a conveyance from her grantor to her husband; *Suydam v. Beals*, 4 McLean, 12, Fed. Cas. No. 13,653, holding that the cancellation and surrender of deeds by the grantee to the grantor will not reinvest the title in the grantor.

Effect of alteration or destruction of deed.

Cited in *Bacon v. Hooker*, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078, holding that a material alteration of a chattel mortgage by mortgagee after execution renders mortgage void, and though title to property is vested in mortgagee, he cannot enter premises for purpose of taking goods, under clause of mortgage allowing him to do so; *Churchill v. Capen*, 84 Vt. 104, 78 Atl. 734, holding that fraudulent alteration of deed renders deed void from time of alteration.

Cited in note in 18 L.R.A. (N.S.) 1170, on effect of destruction or cancelation, or redelivery to grantor for that purpose, of delivered but unrecorded deed.

—Of mortgage.

Cited in *Waring v. Smyth*, 2 Barb. Ch. 119, 47 Am. Dec. 299, holding that where after execution the mortgagee made material alterations in the mortgage which the mortgagor refused to ratify, the mortgage was invalid and neither the mortgagee nor his assigns could enforce it.

Sufficiency of consideration.

Cited in *Mayor v. Kirby*, 2 Legal Chron. 331, holding that an agreement to pay an additional sum if a contractor would reconstruct a building, which had been demolished by storm while in process of construction, was without consideration.

18 E. R. C. 564, *COWPER v. GREEN*, 10 L. J. Exch. N. S. 346, 7 Mees. & W. 633.

Sufficiency of consideration for agreement.

Cited in *Austell v. Rice*, 5 Ga. 472, holding that a note given to a legatee by other legatees in consideration that she relinquish her rights under the will and take sum named in note is given for a valid consideration; *Price v. First Nat. Bank*, 62 Kan. 743, 64 Pac. 639, holding that an assignment of an insurance policy with the understanding that the proceeds are to be applied in satisfaction of a judgment which is in fact extinguished is void for lack of sufficient consideration; *Greenabaum v. Elliott*, 60 Mo. 25, holding that where a note has been paid by the maker it is the duty of the payee to deliver it up and he cannot make his giving it up the consideration of a new promise; *Conover v. Stillwell*, 34 N. J. L. 54, holding that a note, given to secure one against the happening of a certain event which does not happen, cannot be enforced; *Moyer v. Kirby*, 2 Pearson (Pa.) 64, holding that a promise to pay an additional sum for rebuilding a house that builder had contracted to build by a certain date but which had been blown down, is void; *Cleal v. Elliott*, 1 U. C. C. P. 252, holding that a mere promise to pay a note before it becomes due is void.

Cited in note in 34 L.R.A. 36, on performance of existing contract obligation as consideration for new promise.

Promise to pay compounded debt.

Cited in *Samuel v. Fairgrieve*, 21 Ont. App. Rep. 418, holding consideration necessary to promise to pay compounded debt.

Composition as full payment or discharge.

Cited in *Imrie v. Archibald*, 25 Can. S. C. 368; *Breffit v. Campbell*, 24 N. S. 389,—holding compromise had effect of full payment.

Cited in note in 27 L.R.A. 38, on effect of giving creditor secret advantage in composition.

Release of debts as release of securities.

Cited in *First Nat. Bank v. Pope*, 85 Minn. 433, 89 N. W. 318, holding that where a creditor, holding security, partakes in the distribution in insolvency proceedings with unsecured creditors and files his release and judgment is entered discharging insolvent from all liabilities, he cannot afterwards enforce his security; *McDonald v. Taylor & Co.* 144 App. Div. 329, 128 N. Y. Supp. 1048, 2 N. Y. Civ. Proc. Rep. N. S. 184, holding that creditors who enter composition with debtor thereby releases debt and lose right to retain any securities held for debt unless there be agreement to contrary; *Halstead v. Ives*, 73 Hun, 56, 25 N. Y. Supp. 1058, holding it error to preclude debtor from giving evidence showing that debt had been discharged and therefor security released.

Cited in 1 Beach, Contr. 563, on release of debts.

— Express reservation of security.

Cited in *Cragoe v. Jones*, L. R. 8 Exch. 81, 42 L. J. Exch. N. S. 68, 28 L. T. N. S. 36, 21 Week. Rep. 408, holding that where a creditor enters into a contract of composition with his debtor but stipulates to retain his securities, a release under the composition does not release the securities.

Composition deeds reserving individual benefits or preferences.

Cited in *Corbett v. Joannes*, 125 Wis. 370, 104 N. W. 69; *Crossley v. Moore*, 40 N. J. L. 27,—holding that a note given a creditor, and not in the hands of a bona fide holder, to induce him to enter a contract of composition and thereby favoring him over other creditors is void.

18 E. R. C. 578, *WOOD v. BOOSEY*, 37 L. J. Q. B. N. S. 84, L. R. 3 Q. B. 223, 18 L. T. N. S. 105, 16 Week. Rep. 485, affirming the decision of the Court of Queen's Bench, reported in 36 L. J. Q. B. N. S. 103, L. R. 2 Q. B. 340, 15 L. T. N. S. 530, 15 Week. Rep. 309.

Arrangements and rearrangements of another's work as subject of copyright.

Cited in *Schuberth v. Shaw*, Fed. Cas. No. 12,482, holding that where labor has been performed on a production a copyright may be obtained on the result it not being necessary that laborer be sole creator of work.

Cited in *Macgillivray Copyr.* 113, on right to fair use of prior copyrighted work on subject in which there are common sources of information.

— Arrangement or orchestration of music.

Cited in *Carte v. Evans*, 27 Fed. 861, on the original character of an arrangement of an orchestral score of an opera for a piano-forte within the meaning of copyright law; *Fairlie v. Boosey*, L. R. 4 App. Cas. 711, 48 L. J. Ch. N. S. 697, 41 L. T. N. S. 73, 28 Week. Rep. 4 (affirming L. R. 7 Ch. Div. 301, 47 L. J. Ch. N. S. 186, 37 L. T. N. S. 590, 26 Week. Rep. 178), holding that arrangements of music from an opera for piano and voice constitute a composition entitling composer to copyright.

Cited in *Drone*, Copyr. 411, on substantial identity test of piracy.

Requisites of registration for copyright.

Cited in *Collingridge v. Emmott*, 57 L. T. N. S. 864, holding that the day of the first publication of the production must be registered, registration of month not being sufficient to compute time from which copyright begins to run; *Mathieson v. Harrod*, L. R. 7 Eq. 270, 38 L. J. Ch. N. S. 139, 19 L. T. N. S. 629, 17

Week. Rep. 99, holding that to comply with registry statute the very day of the month upon which book was published must be registered.

Cited in Macgillivray, Copyr. 134, on registration of musical compositions.

— **Registration of assignee to enable him to sue for infringement.**

The decision of the Court of Queen's Bench was distinguished in *Liverpool General Brokers Assn. v. Commercial Press Telegram Bureau* [1897] 2 Q. B. 1, 66 L. J. Q. B. N. S. 405, 76 L. T. N. S. 292, holding that the assignee of a copyright under the statute must be registered before he can maintain an action for infringement thereof.

Right to restrain importation of copies of copyrighted book.

The decision of the Court of Queen's Bench was cited in 32 Ont. Rep. 393, *Morang v. Publishers' Syndicate*, holding that assignee of copyright of book was entitled to injunction restraining importation of copies of book from United States.

18 E. R. C. 601, *PORDAGE v. COLE*, 1 Wms.' Saund. 319, 1 Sid. 423, 1 Lev. 274, T. Raym. 183, 2 Keb. 533, 542.

Covenants as dependent or independent.

Cited in *Stone v. Grover*, 1 Ala. 287; *Lloyd v. Jewell*, 1 Me. 352, 10 Am. Dec. 73,—holding that want of title at time of conveyance cannot be set up in action on note given for purchase money of land conveyed by deed with covenants of seisin and warranty; *Delafield v. DeGrauw*, 1 Abb. App. Dec. 500, holding that agreement to pay and provision for inspection were independent in contract of sale of merchandise to be delivered at certain place subject to inspection at another; *Water Lot Co. v. Leonard*, 30 Ga. 560, holding that mutual covenants as to blasting and blowing out race, were independent and not dependent they going to part, and not to whole of consideration; *Bishop v. Stewart*, 13 Nev. 25, holding that dependency or independency of covenants in contract should be determined when possible with reference to time of performance required by contract; *Delafield v. De Grauw*, 3 Keyes, 467, holding that when plaintiff contracted to deliver 4200 barrels of cement of a particular character subject to government inspection, defendant being entitled to a credit of 30 days from time of delivery but to secure plaintiffs, the duty of payment was absolute, and defendant upon the character of the cement received; *Bennet v. Pixley*, 7 Johns. 249; *Quinlan v. Davis*, 6 Whart. 169; *Fudiekar v. Guardian Mut. L. Ins. Co.* 62 N. Y. 392,—holding that covenant, consideration for which goes only to part of contract is independent covenant; *Fisher v. Fisher*, 1 Bradf. 335, holding that where covenant relates to essential part of contract which is inseparable no cause of action lies for breach of such covenant alone; *Hounsford v. Fisher, Wright* (Ohio) 580, holding that if one contracts for purchase of articles to be thereafter delivered for which he agrees to pay, covenants are mutual; *Gould v. Brown*, 6 Ohio St. 538, holding that agreement to carry mail between certain points for specified term at fixed price, is one containing independent covenants; *Powell v. Dayton, S. & G. R. R. Co.* 12 Or. 488, 8 Pac. 544, holding that covenants are dependent where the act of each party is to be done at the same time necessitating the averring of a tender of performance; *Bream v. Marsh*, 4 Leigh. 21, holding that where reciprocal covenants have been contracted, and one party has partially performed and has no other remedy except action on covenant covenants shall be considered independent covenants; *Taylor v. Gallup*, 8 Vt. 340, holding that conditions precedent must appear to be such by express terms of contract, or by necessary implication, or they will be deemed independent

covenants; See *v. Blanchflower*, 2 Sask. L. R. 20, holding that where a covenant goes only to part of the consideration and a breach thereof may be compensated in damages, it is an independent covenant and not a condition precedent.

Cited in 2 *Thomas, Estates*, 1069, as to whether covenants indeed are dependent or independent; *Hollingsworth, Contr.* 491, on breach of contract by one party as discharging obligation of other in case of absolute promises; 1 *Beach, Contr.* 113, on different kinds of covenants; *Benjamin, Sales*, 5th ed. 559, on conditions and warranties in sales of goods.

Conditions precedent.

Cited in *Green v. Dyersburg*, 2 *Flipp.* 477, *Fed. Cas. No.* 5,756, holding that municipal bonds reciting that they would be payable upon construction of railroad were not enforceable unless railroad was constructed; *Bayard v. McLane*, 3 *Harr. (Del.)* 139, holding that where mutual covenants go to whole consideration on both sides, they are mutual conditions, and conditions precedent; *Barry v. Alsbury*, *Litt. Sel. Cas. (Ky.)* 149, holding that whenever the entire consideration of the demand claimed, is stipulated to be performed at the time of, or previous to the performance of the demand, the performance of the consideration is a condition precedent; *Parmelee v. Oswego & S. R. Co.* 6 *N. Y.* 74, holding that precedence of conditions depends upon order of time in which intent of transaction requires their performance; *Plant v. Hernreich*, 19 *Misc.* 308, 44 *N. Y. Supp.* 477, holding that failure of landlord to make repairs is not condition precedent to collection of rent; *Grant v. Johnson*, 6 *Barb.* 337, holding that the tender of a deed was not a condition precedent, but the promise to pay a second installment was an independent covenant where property was sold, payment to be made in installments, only one of which was to be paid before delivery of deed; *Topping v. Root*, 5 *Cow.* 404, holding that under agreement to furnish increased quantity of article of notice was given prior to certain day, it is necessary to show that notice was given and that party was ready to pay for increased quantity; *Martin v. Bobo*, 1 *Speers, L.* 26, 40 *Am. Dec.* 587; *Coleman v. Rowe*, 5 *How. (Miss.)* 460, 37 *Am. Dec.* 164; *Perry v. Rice*, 10 *Tex.* 367,—holding that where stipulation of bond of title were that conveyance should be made, when purchase money shall be paid and note was given for purchase money, making of title was not condition precedent to payment of purchase money; *Cowan v. Fisher*, 31 *Ont. Rep.* 426, holding that where one purchased a machine from iron founders and an inventor, one of the terms being that the inventor should personally install the machine, the covenant to install was not a condition precedent, but as a separable covenant, which could be compensated for in damages; *Benns v. Raymond*, 3 *U. C. C. P.* 126, upon conditions precedent to an act; *McSherry v. Brooks*, 46 *Md.* 103, holding that performance of acts in consideration of the giving of promissory notes is not a condition precedent to payment of the notes.

Cited in notes in 30 *L.R.A.* 37, on right to rescind or abandon contract because of other party's default; 24 *E. R. C.* 350, on right to hold cargo until payment of freight.

Cited in *Hollingsworth, Contr.* 519, on discharge of contract because of failure to perform condition precedent; 1 *Beach, Contr.* 123, on conditions precedent in contract for sale of land; 1 *Beach, Contr.* 114, on time of performance of contract; *Benjamin, Sales*, 5th ed. 430, on recovery back of money paid for specific goods which perish after the contract; *Benjamin, Sales*, 5th ed. 562, on changing conditions precedent into warranty by acceptance of partial performance; *Ben-*

jamin, Sales, 5th ed. 596, on implied conditions in mutual agreement for cross sale.

Distinguished in *Burkhart v. Hart*, 36 Or. 586, 60 Pac. 205, holding that where the whole consideration for a note is the performance of agreement nonperformance constitutes total failure of consideration.

Dependency of covenants to sell, convey or do work and covenants to pay.

Cited in *Wade v. Killough*, 3 Stew. & P. (Ala.) 431, holding that where conveyance was specially secured by bond for title the price could be recovered independently; *Manuel v. Campbell*, 3 Ark. 324, holding that under terms of contract the building complete without delay of a mill was precedent to promise to pay for it; *Donovan v. Judson*, 81 Cal. 334, 6 L.R.A. 591, 22 Pac. 682, holding that where no time is fixed for execution the intention is manifest that execution is not to be a condition precedent of payment; *Strohecker v. Barnes*, 17 Ga. 340, holding an agreement to rent premises dependent upon a covenant by the lessor to put the same in repair which becomes a condition precedent to payment of rent; *Dakin v. Williams*, 11 Wend. 69, holding that agreement to pay specified price for business and vendor's bond not to re-engage in similar business are mutually dependent covenants; *Central Appalachian Co. v. Buchanan*, 20 C. C. A. 33, 43 U. S. App. 265, 73 Fed. 1006, holding lessee's covenant to pay royalties on coal mined and to mine a certain minimum quantity is independent of lessors covenant to provide facilities for mining at a later period, both on ground of partial consideration and relative time for performance.

— Relative time for payment and for performance.

Cited in *McKnight v. Dunlop*, 4 Barb. 36, on relative terms of payment and performance as affecting dependency of covenants; *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362; *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91,—holding that a stipulation for partial payment prior to conveyance of land is independent but that stipulation to pay balance upon conveyance is dependent; *Leonard v. Bates*, 1 Blackf. 172, holding same and that a further payment to be made after conveyance is also dependent; *Bailey v. White*, 3 Ala. 330, holding that where the obligation to pay depends upon delivery of the property delivery is a condition precedent whether to be done before or at the time as payment; *Putnam v. Mellen*, 34 N. H. 71, holding that although mutual covenants to simultaneously exchange property are interdependent a further covenant to on a future day pay boot money is not a condition precedent to the agreement to exchange.

— Where payment is to precede performance.

Cited in *Broughton v. Mitchell*, 64 Ala. 210; *Grice v. Jones*, 33 App. D. C. 278; *Solary v. Stultz*, 22 Fla. 263; *Strays v. Yeager*, 48 Ind. App. 448, 93 N. E. 877; *Stevenson v. Kleppinger*, 5 Watts, 420; *Seley v. Texas & St. L. R. Co.* 2 Tex. App. Civ. Cas. 66; *Smith v. Busby*, 15 Mo. 387, 57 Am. Dec. 207, — holding that if day is appointed for payment of money and the day is to happen before the thing which is consideration of money, is to be performed, action may be sought for money before performance; *Hiel v. Grigsby*, 35 Cal. 656, holding that where purchase money is payable in installments and conveyance to be executed on last day of payment, covenants to pay installments falling due before time for execution of deed are independent covenants; *Babcock v. Wilson*, 17 Me. 372, 35 Am. Dec. 263, holding that if the day appointed for payment must or may happen before performance the consideration such performance is not a condition precedent; *Brehen v. O'Donnell*, 34 N. J. L. 408, holding a covenant for payment without stipulating time is for cash and is independent of a covenant to permit the removal of sand in consideration of such payment; *Egbert v. Chew*,

14 N. J. L. 446, holding that clause in contract that no transfer of title was to take place, unless first installment was paid, did not make it necessary for vendee to pay money except upon delivery of deed; *Paine v. Brown*, 37 N. Y. 228, holding that where, by terms of contract, it is provided that payments shall be made previously to execution of deed, it is not necessary for plaintiff to convey or offer to convey before bringing suit for installment; *Grant v. Johnson*, 5 Barb. 161, holding that where land is to be paid for by instalments, covenants as to instalments payable before conveyance are independent; *Watson v. Bledsoe*, 60 N. C. (1 Winst. L.) 253, holding that a demand obligation to pay for goods to be delivered at a future date is an independent covenant; *MacArthur v. Leckie*, 9 Manitoba L. Rep. 110; *Adrian v. Lane*, 13 S. C. 183,—holding that where consideration was to be paid in instalments all of which were due before vendor was bound to convey the covenants are independent; *Merritt v. Ellis*, 1 N. B. 457, holding that shipowner who refused to pay as agreed at particular stages of building cannot maintain action for failure to complete vessel; *Driscoll v. Barker*, 18 N. B. 407, holding that under contract to pay for construction as the work progresses such payment is condition precedent to construction; *Loud v. Pomona Land & Water Co.* 153 U. S. 564, 38 L. ed. 822, 14 Sup. Ct. Rep. 928, holding that where land is to be paid for by instalments, conveyance to be made upon payment in full, final payment is condition precedent to conveyance; *Grant v. Johnson*, 5 N. Y. 247, holding that a covenant to pay final instalment upon realty upon execution of conveyance is a dependent covenant; *Hutcheson v. McNutt*, 1 Ohio, 14, holding that agreement to pay half expense of procuring patent creates condition precedent to covenant to convey since patent was essential to conveyance and expense was necessary to secure patent; *Chase v. Behrman*, 10 Daly, 344, on dependence of covenants where instalment payments are to precede performance; *Hartt v. Wishard Langan Co.* 18 Manitoba L. Rep. 376, holding that covenant to pay purchase money in instalments is independent; *H. H. Vivian Co. v. Clergue*, 16 Ont. L. Rep. 372, holding that where day is appointed for payment of money and the day is to happen before thing which is consideration of money is to be performed, action may be brought for money.

Distinguished in *Roach v. Dickinson*, 9 Gratt. 154, holding that covenant to convey upon completion of instalment payments is dependent upon payment of final instalment.

— Uncertainty as to time of performance.

Cited in *Overton v. Curd*, 8 Mo. 420, holding that where no time is fixed for the performance of that which is the consideration of the money or other act the promise to pay is absolute and unconditional; *Dox v. Dey*, 3 Wend. 356, holding that an agreement to pay on a fixed day for goods to be delivered on demand is independent of the covenant to deliver; *Smith v. Betts*, 16 How. Pr. 251, holding that an agreement to pay specified sum on day certain is independent of the further and interdependent covenants to deliver notes at no fixed time whereupon in consideration of notes and of prior payment certain rights shall be assigned; *Sayre v. Craig*, 4 Ark. 10, 37 Am. Dec. 757, holding covenant to pay on day certain and one to convey on certain day thereafter were independent; *Duncan v. Jeter*, 5 Ala. 604, 39 Am. Dec. 342, holding that stipulation to convey upon getting title from government is independent of stipulation to pay at fixed period; *Bailey v. Clay*, 4 Rand. (Va.) 346, holding that in covenant for purchase of land, where no time is limited for conveyance, and time is limited for payment of purchase price, conveyance is not condition precedent

to right to demand price; *Wilson v. Wittrock*, 19 U. C. Q. B. 391, holding that where land was to be paid for in instalments conveyance and abstract to be given "on payment" as stated the covenants were independent; *Lowry v. Mc-haffy*, 10 Watts, 387, holding that where land was to be paid for in instalments and conveyance was to pass after final payment unless purchaser elects to sooner give bond and mortgage, covenants for payments were independent; *Gibson v. Newman*, 1 How. (Miss.) 341, holding that the conveyance of land for which notes are executed is not a condition precedent to payment of the notes, no time for conveyance having been fixed; *Sumner v. Parker*, 36 N. H. 449, holding that an agreement to pay money immediately as expressed in a demand note is independent of a covenant to, at no fixed time thereafter, convey land in consideration of the note; *Morse v. Hueston*, 4 N. S. 61, holding that a covenant to give bond for deed upon survey of land does not render survey condition precedent to payment for land; *McDonald v. Murray*, 2 Ont. Rep. 573, holding that covenant to pay part on execution of agreement to convey, part within sixty days thereafter and balance to remain in mortgage is independent of covenant to convey and actual conveyance is not condition precedent; *Wiggins v. Covington & C. Bridge Co.* 1 Disney (Ohio), 573, holding that under contract to lease "at earliest convenience" stipulations for payment of rental at fixed periods are independent covenants; *Allard v. Belfast*, 40 Me. 369, holding a covenant to hold municipality harmless for negligence of covenant or in maintaining highway is indefinite as to duration and independent of obligation of municipality to pay for such maintenance at fixed quarterly periods; *Trimble v. Green*, 3 Dana, 353, explaining that the unfixed time for performance does not render covenants independent where time for payment must necessarily follow rather than precede performance; *McDonald v. Murray*, 11 Ont. App. Rep. 101, holding that time being fixed for payment and none for doing act constituting consideration, action lies for payment without performance of act.

— Where performance is to precede payment.

Cited in *Sheeren v. Moses*, 84 Ill. 448, holding that payment of last note making up purchase money can not be enforced unless upon tender of deed before action; *Horine v. Best*, 2 Bibb. 547, holding that where covenant to convey is to be performed prior to covenant to pay conveyance becomes a condition precedent; *Watchman v. Crook*, 5 Gill. & J. 239, holding that where work is to be paid for in instalments the completion of the work within the designated time is a condition precedent to payment of such instalments as fall due upon or after such completion; *Cunningham v. Morrell*, 10 Johns. 203, 6 Am. Dec. 332, holding that where work is to be paid for by instalments as completed partial performance is condition precedent to partial payment pro tanto and final completion is condition precedent to final payment; *King Philip Mills v. Slater*, 12 R. I. 82, 34 Am. Rep. 603, holding that plaintiff having failed in first deliveries of goods which he contracted to manufacture and deliver in successive lots, cannot compel acceptance of goods manufactured and offered subsequently.

— Where payment and performance are to be concurrent.

Cited in *Eames v. Der Germania Turn Verein*, 8 Ill. App. 663; *Whidden v. Belmore*, 50 Me. 357; *Lawrence v. Dole*, 11 Vt. 549,—holding that in contract of sale of land, if price is to be paid at time of conveyance, covenant to convey and to pay price are dependent covenants; *Kandal v. Talbot*, 2 Bibb. 614, holding that where performance and payment are to be simultaneous the covenants are interdependent; *Hammond v. Gilmore*, 14 Conn. 479; *Braswell v. Pope*, 82 N. C. 57; *Van Schaick v. Winne*, 16 Barb. 89,—holding that where two acts

are to be done reciprocally and concurrently each party is bound to be prepared at the time fixed to do his part; *Kelly v. Baker*, 26 App. Div. 217, 49 N. Y. Supp. 973, holding that under agreement to furnish release, and corresponding agreement to pay money, performance at same time is necessary; *Glazebrook v. Woodrow*, 8 T. R. 366, that covenants to convey and to pay upon the same day are mutually dependent; *Paynter v. James*, L. R. 2 C. P. 348, 15 L. T. N. S. 660, 15 Week. Rep. 493, 24 Eng. Rul. Cas. 341, holding that an agreement to deliver cargo upon payment of remaining part of freight charge creates dependent covenants to do concurrent acts; *Lester v. Jewett*, 11 N. Y. 153, holding that a contract for the purchase of stock on a day certain creates dependent covenants to sell and to pay; *Ragland v. Butler*, 18 Gratt. 323, holding that in sales delivery and payment are ordinarily concurrent and demand for payment immediately upon delivery is not premature.

-- Intent as controlling.

Cited in *Davis v. Lyman*, 6 Conn. 249, holding that covenants in deeds are to be construed according to their spirit and intent; *Maryland Fertilizing & Mfg. Co. v. Lorentz*, 44 Md. 218, holding that conditions are to be construed according to the fair intention of the parties; *Dodge v. McClintock*, 47 N. H. 383, holding that although contracts may be mutual, in so far as one is the consideration for the other the question of dependence or independence must be resolved from the evident intent of the parties; *Robinson v. Crownsheild*, 1 N. H. 76, holding that whether or not all parts of agreement are dependent and inseparable is to be determined by intent of parties as evinced by language and nature of whole contract; *McCrelish v. Churchman*, 4 Rawle. 26, holding that covenants are to be construed dependent or independent of each other, according to intention of parties and good sense of case; *McLure v. Rush*, 9 Dana, 65, holding that if the parties looked to their mutual covenants for indemnity the covenants may be regarded as independent but if instalments to be paid are in consideration of prior services such services become conditions precedent to payment; *Coatsworth v. Toronto*, 10 U. C. C. P. 73, holding that the consideration for a contract for services to be paid for in instalments over a fixed period was complete performance rather than the covenant to perform; *Tompkins v. Elliot*, 5 Wend. 496, holding that a contract to clear land for cropper by its terms showed intent of parties to rely upon the covenants rather than on prior performance; *McMillan v. Vanderlip*, 12 Johns. 165, 7 Am. Dec. 299, holding that a contract to pay for the product of a specific period of labor was by its terms entire and the time of service was condition precedent; *Sweeny v. Godard*, 9 N. B. 300, on intent as the test of dependence or independence; *Walker v. Kelly*, 24 U. C. C. P. 174, on intent as time test and denying infallibility of Serjeant Williams' rules; *Roberts v. Brett*, 14 E. R. C. 674, 34 L. J. C. P. N. S. 241, 11 H. L. Cas. 337, 11 Jur. N. S. 377, 12 L. T. N. S. 286, 13 Week. Rep. 587, on intent being the criterion and Williams' rules being intended to describe the indicia of such intent.

Cited in note in 14 Eng. Rul. Cas. 688, on considering intention of parties as deduced from entire instrument in determining whether doing of particular act is a condition precedent.

Cited in *Benjamin, Sales*, 5th ed. 561, on rules of construction for discovery of intention of parties in making warranties.

-- Partial performance or consideration where breach may be compensated in damages.

Cited in *Quarson v. American Law Book Co.* 143 Iowa, 517, 32 L.R.A.(N.S.)

1. 121 N. W. 1009, on the point that defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms: *Stone v. Bennett*, 8 Mo. 41; *Hutcheson v. Creel*, 2 Litt. (Ky.) 348; *Hunt v. Tibbetts*, 70 Me. 221; *Pacific Mill Co. v. Inman*, 46 Or. 352, 80 Pac. 424; *Romel v. Alexander*, 17 Ind. App. 257, 46 N. E. 595; *Obermyer v. Nichols*, 6 Binn. 159, 6 Am. Dec. 439,—holding that where covenant goes only to part of consideration on both sides, and breach may be compensated by damages, it is independent covenant; *Payne v. Ladue*, 1 Hill, 116, holding that where consideration for note is composed of several things, and defendant has received part of it, action may be maintained by either party; *Day v. Essex County Bank*, 13 Vt. 97, holding that where the covenants do not each respectively constitute the consideration for the other they are independent; *J. W. Ellison, Son & Co. v. Flat Top Grocery Co.* 69 W. Va. 380, 38 L.R.A.(N.S.) 539, 71 S. E. 391, holding that purchaser of 200 carloads of hay to be delivered and paid for in monthly instalments has no right to rescind for defect in quality of part of hay delivered but must recoup: *Pickens v. Bozell*, 11 Ind. 275, holding that where there has been actual benefit from partial performance and the failure to complete may be compensated in damages the stipulations will be construed independently; *Coe v. Bradley*, Fed. Cas. No. 2,941, holding that the acceptance and enjoyment of part consideration will render dependent covenants independent: *Heaston v. Krieg*, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805, holding that a condition is not to be implied from the mention of a consideration which does not go to the whole consideration; *Luce v. New Orange Industrial Asso.* 68 N. J. L. 31, 52 Atl. 306, holding that breach of a subsidiary agreement which may be compensated in damages, furnishes no ground for rescission of the entire contract: *Wallace v. Antrim Shovel Co.* 44 N. H. 521, holding that breach of a stipulation which is but part of the consideration for a contract and may be compensated in damages does not warrant rescission; *Simpson v. Crippin*, L. R. 8 Q. B. 14, 42 L. J. Q. B. N. S. 28, 27 L. T. N. S. 546, 21 Week. Rep. 141, holding that buyer's failure to furnish agreed facilities to handle one instalment of goods furnished no ground for rescission of entire contract; *Blackburn v. Reilly*, 47 N. J. L. 290, 54 Am. Rep. 159, 1 Atl. 27, holding agreement to sell stated goods weekly, payable on delivery, was not rescindable on one default without indicia of abandonment of whole contract; *Union P. R. Co. v. Travelers' Ins. Co.* 28 C. C. A. 1, 49 U. S. App. 752, 83 Fed. 676, holding that covenant to stop passenger trains at hotel leased from railway company did not go to the entire consideration for lease; *Port Whitby & P. W. R. Co. v. Dumble*, 22 U. C. C. P. 39, holding that completion of railway according to contract is a covenant independent of the covenants to pay therefor by instalments as the work progresses; *Andrews v. Moore*, Tappan (Ohio), 183, holding that covenants to pay for realty in instalments, one before, one at time of and one subsequent to conveyance are independent of the covenant to convey; *Button v. Thompson*, L. R. 4 C. P. 330, 38 L. J. C. P. N. S. 225, 20 L. T. N. S. 568, 17 Week. Rep. 1069, holding that the wages of a ship officer, signed for the voyage, becomes due at the end of each month and the ship having left him at an intermediate port through his own negligence he is entitled to pay up to time of leaving vessel, there having been no desertion; *Murray v. Gilbert*, 12 N. B. 553, holding that one who has under contract cut and hauled away a portion of the timber on property is

liable for the price thereof although prevented from enjoying his contract right to cut all; *Kauffman v. Raeder*, 54 L.R.A. 247, 47 C. C. A. 278, 108 Fed. 171, holding that an agreement by a landlord to assign certain stock to tenants upon their payment of specified rentals in lieu of which stock was given does not go to the entire consideration: *Tait v. Tait*, 6 Leigh, 154, holding that covenants to operate a mill at joint expense and to share cost of necessary rebuilding, are independent: *Bettini v. Gye*, 45 L. J. Q. B. N. S. 209, L. R. 1 Q. B. Div. 183, 34 L. T. N. S. 246, 24 Week. Rep. 551, holding that that portion of an opera singer's contract requiring him to be present six days prior to first public performance was not a condition precedent going to the root of the contract; *West v. Bechtel*, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69; *Woodworth v. Curtiss*, 7 Wend. 112; *McArthur v. Winslow*, 6 U. C. Q. B. 144 (dissenting opinion); *Mersey Steel & I. Co. v. Naylor*, L. R. 9 App. Cas. 434, 53 L. J. Q. B. N. S. 497, 51 L. T. N. S. 637, 32 Week. Rep. 989, L. R. 9 Q. B. Div. 648, 51 L. J. Q. B. N. S. 576, 47 L. T. N. S. 369, 23 Eng. Rul. Cas. 504; *Robinson v. Mollett*, L. R. 7 H. L. 802, 44 L. J. C. P. N. S. 362, 33 L. T. N. S. 544; *Midland R. Co. v. Ontario Rolling Mills Co.* 2 Ont. Rep. 1,—on independence of covenants going to only part consideration; *McMath v. Johnson*, 41 Miss. 439, on agreement to pay by instalments or at different times as rendering the covenants independent; See *v. Branchflower*, 2 Sask. L. R. 20, holding that where covenant does not go to whole consideration and breach may be compensated in damages, such covenant is independent.

Cited in *Hollingsworth*, Contr. 493, 502, on right to recover for breach of contract by one who has not performed in case of divisible performance.

Distinguished in *Evans v. Harris*, 19 Barb. 416, pointing out that the rule as to part consideration applies only to prevent injustice; *Honck v. Muller*, L. R. 7 Q. B. Div. 92, 50 L. J. Q. B. N. S. 529, 45 L. T. N. S. 202, 29 Week. Rep. 830, holding that one refusing to accept any delivery at time agreed cannot thereafter exercise option to have delivery made by instalments, the contract not being a speciality.

—Where action for damages is inadequate.

Cited in *Bradford v. Williams*, L. R. 7 Exch. 259, 41 L. J. Exch. N. S. 164, 26 L. T. N. S. 641, 20 Week. Rep. 782, holding that a refusal to load ship at one of the points stipulated in charter party is a breach which goes to the root of the contract and justifies shipmaster in refusing to proceed under the charter-party.

Performance or tender as precedent to action.

Cited in *Lomax v. Bailey*, 7 Blackf. 599, holding that where one party to entire contract has not complied with its terms, but professing to act under it has delivered to other party something of value, no action will lie on that contract for thing delivered; *McCall v. Welsh*, 3 Bibb, 289; *Rogers v. Colt*, 21 N. J. L. 18,—holding that where covenant in contract is independent action may be maintained thereon without proof of performance of other covenants therein; *Veazie v. Bangor*, 51 Me. 509, holding that where services are performed under special contract, party claiming payment therefor must prove substantial performance; *Yorston v. Brown*, 178 Mass. 103, 59 N. E. 654, holding that stipulation in contract for purchase of history of masonry that plaintiff's portrait would be published therein is not enforceable unless portrait is published as agreed upon; *Palmer v. Ferry*, 6 Gray, 420, holding that when covenant in contract is independent either party may sue without showing performance upon his part; *Stanley v. Stanley*, 2 N. H. 364, holding that no action can be maintained

upon contract without showing performance of condition precedent; *French v. Bent*, 43 N. H. 448, holding that in action upon implied covenant, plaintiff, if he has not performed other conditions precedent, and shows no special damages will be entitled to nominal damages only; *Hard v. Seeley*, 47 Barb. 428; *Dey v. Dox*, 9 Wend. 129, 24 Am. Dec. 137,—holding that nonperformance of mutual and independent covenant is not bar to action thereon; *Fickett v. Brice*, 22 How. Pr. 194, holding that neither party can maintain action against other for breach of contract which binds one party to deliver article and other party to pay on delivery, without showing performance or tender thereof; *Smith v. Christmas*, 7 Yerg. 565, holding that where two acts are to be performed at same time though it is uncertain which party is to do first act neither can maintain action, without showing performance or at least readiness to perform; *Phillips v. Merritt*, 2 U. C. C. P. 299, holding that tender to be sufficient must include every material item of the condition precedent; *Gould v. Jones*, 3 U. C. Q. B. O. S. 53, on tender as equivalent to performance for purpose of maintaining action; *Clarke v. Bache*, 42 W. N. C. 265, 40 Atl. 484, on necessity of tender of payment as condition precedent to action for failure of performance where payment was to precede performance; *Stow v. Stevens*, 7 Vt. 27, 29 Am. Dec. 139, holding that when obligor binds himself, upon payment of money and execution of notes at certain time, to convey land by good deed, and previously conveys same to another, obligee must show readiness to perform, although he need not show tender of performance.

Cited in 1 Underhill, Land. & T. 600, on necessity of performance of dependent covenant as pre-requisite for maintenance of action for breach of other to perform his covenant; *Hollingsworth*, Contr. 488, failure of performance by one party as discharging the contract.

Pleading conditions precedent.

Cited in *Goodwin v. Lynn*, 4 Wash. C. C. 714, Fed. Cas. No. 5, 553, holding that when covenants in agreement are dependent, plaintiff must aver performance of offer to perform covenants on his part; *Jones v. Sommerville*, 1 Port. (Ala.) 437; *Castleberry v. Pierce*, 5 Stew. & P. (Ala.) 150, 24 Am. Dec. 774,—holding that where two acts are to be done at same time, neither party can bring action, without showing performance of, or to perform; *M'Gehee v. Hill*, 4 Port. (Ala.) 170, 29 Am. Dec. 277, holding that in action for nondelivery of goods, under agreement, whereby one contracts to sell and deliver and other to pay on delivery, readiness to pay must be alleged; *Childress v. Foster*, 3 Ark. 252, holding that where right of action depends upon performance of condition precedent by plaintiff, if declaration does not allege performance omission is not cured by verdict; *Waldron v. Brazil & C. Coal Co.* 7 Ill. App. 542, holding that performance of condition precedent is a necessary averment; *Simonds v. Beauchamp*, 1 Mo. 589, holding that where two covenants are independent, averments of performance of one of them in suit upon other, will be considered immaterial, and plea, traversing performance, will be bad on general demurrer; *Ackley v. Richman*, 10 N. J. L. 304, holding that declaration on contract for sale of lands at auction upon condition that purchaser should pay at and vendor deliver deed within six days, should allege tender of purchase money by plaintiff; *Williams v. Healey*, 3 Denio, 363; *Acer v. Hotchkiss*, 97 N. Y. 395,—holding that in case of mutual and dependent covenants to be performed at same time action cannot be maintained upon either without alleging performance or offer of performance by plaintiff; *Porter v. Rose*, 12 Johns. 209, 7 Am. Dec. 306, holding that where two acts are to be done at the same time, as when one agrees to

sell and deliver, and the other to receive and pay, an averment by the purchaser, in case he sues for non-delivery, of a readiness and willingness to pay, is indispensably necessary; *Lester v. Jewett*, 12 Barb. 502, holding that not only readiness but actual performance or tender of performance of a dependent covenant must be alleged; *Salmon v. Jenkins*, 4 M'Cord, L. 288, holding that an agreed penalty in case of default is dependent upon the occurrence of the specified default and must be pleaded; *Haywood v. Harmon*, 17 Ill. 477, on necessity to aver performance or readiness to perform conditions precedent; *Negley v. Stewart*, 10 Serg. & R. 207, holding that it is not necessary, in suit against purchaser of land at sheriff's sale, brought to recover purchase money to aver tender of deed acknowledged; *Law v. House*, 3 Hill, L. 268; *Pollard v. McClain*, 3 A. K. Marsh. 24,—holding that where there are mutual covenants to be performed simultaneously averment that plaintiff is ready and willing to perform is not sufficient; *Ragland & Co. v. Butler*, 18 Gratt. 323, holding that under contract to advance freight on quantity of lumber to be shipped, which was to be deducted from note agreed to be given, it was not necessary to aver payment of freight before requiring delivery of note; *Baltimore & O. R. Co. v. McCullough*, 12 Gratt. 595, holding that where reciprocal acts are concurrent, and to be done at same time, neither party can maintain action against other without averring performance upon his part or its equivalent; *Frank v. Sun Life Assur. Co.* 20 Ont. App. Rep. 564, holding that recovery on policy cannot be had with allegation and proof of payment of premium.

Criticised in *Baker v. Booth*, 2 U. C. Q. B. O. S. 407, holding that averment of readiness to perform condition is sufficient.

— Sufficiency of pleading.

Cited in *North v. Pepper*, 21 Wend. 636, holding that in action against purchaser of land, averment of execution of deed, notice to purchaser and demand of performance on his part is equivalent to averment of tender of deed.

Breach or performance of condition as matter of defense or declaration.

Cited in *Ashmore v. Pennsylvania Steam Towing & Transp. Co.* 28 N. J. L. 180, holding it unnecessary to plead in tort against one for negligent towing that plaintiff had done all things agreed for safety of the tow.

Cited in *Benjamin*, Sales, 5th ed. 727, 728, as to whether a partial breach of a contract of sale is a repudiation thereof as a question of fact.

Mutual covenants.

Cited in *Weaver v. Childress*, 3 Stew. (Ala.) 361, holding that covenant to give possession on or before certain day and agreement to pay instalment on certain day, and balance on subsequent day at which time valid title would be passed were mutual covenants.

Implied reciprocal covenants.

Cited in *Jordan v. Indianapolis Water Co.* 159 Ind. 337, 64 N. E. 680; *Ferguson v. Getzendaner*, 98 Tex. 310, 83 S. W. 374; *Hinds v. Hinchman Renton Fireproofing Co.* 9 C. C. A. 325, 165 Fed. 339; *Tisdale v. Dallas*, 11 U. C. C. P. 238; *Hall v. Gilmour*, 9 U. C. Q. B. 492 (dissenting opinion); *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 8 Wall. 276, 19 L. ed. 349,—on implied promise corresponding to that expressed on part of other party; *Wells v. Alexandre*, 24 Jones & S. 542, 4 N. Y. Supp. 874, on the implication of reciprocal promise from agreement to other party's proposal; *Buckmaster v. Consumers' Ice Co.* 5 Daly, 313, holding that while a corporation might by agreement with stockholder, acquire a valid lien on stock held by him to secure his obligations to company so that stock cannot be transferred until obligations are paid it necessarily assumed

by implication a corresponding obligation to do and perform that which was stated as a consideration for the acts expressly undertaken by the other party; *Koster v. Holden*, 16 U. C. C. P. 331, on implied reciprocal covenants where agreement is signed by both parties; *Black v. Woodrow*, 39 Md. 194, holding that a contract for the construction of a building implies permission to allow it to be built upon the designated land; *Milske v. Steiner Mantel Co.* 103 Md. 235, 5 L.R.A.(N.S.) 1105, 115 Am. St. Rep. 354, 63 Atl. 471, on the same point; *Lewis v. Atlas Mut. L. Ins. Co.* 61 Mo. 534, holding that there is an implied obligation to do or permit that which is necessary to performance of other party's obligation; *Laclede Constr. Co. v. Tudor Iron Works*, 169 Mo. 137, 69 S. W. 384, on the same point; *Lovering v. Lovering*, 13 N. H. 513, holding that there is an implied covenant not to so act as to render ones own agreement impossible of performance; *Baldwin v. Humphrey*, 44 N. Y. 609, holding that where one party agrees to pay for certain work the other party by signing the agreement is under implied obligation to perform the work; *Barton v. McLean*, 5 Hill, 256, holding that an agreement to supply forge with necessary ore at specified price in consideration of use of forge for cleansing ore implies obligation of forge owner to buy all necessary ore from contractor; *Justice v. Lang*, 52 N. Y. 323, holding that no presumption of reciprocal obligation arises from an agreement signed by but one of the parties the inference, if any, being a question of fact; *Chicago & O. R. Co. v. Pyne*, 30 Fed. 86, holding that the signature of the designated trustee to a trust agreement by other parties implies an obligation to accept and administer the trust as indicated in the document; *Berry v. Garrard*, 32 U. C. Q. B. 173, holding that agreement to sell, signed by both parties, implies covenant to buy; *Churchward v. R. L. R.* 1 Q. B. 173, 14 L. T. N. S. 57, pointing out that the courts should take care not to read into a contract a provision which was intentionally omitted.

Distinguished in *Portland v. Brown*, 43 Me. 223, as not applicable to contracts signed by one party only; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 154; *Bruce v. Fulton Nat. Bank*, 16 Hun, 615,—holding that a contract to renew at end of term is not necessarily binding upon lessee.

Excuse for non-performance of covenant.

Cited in *Holt v. United States Security L. Ins. & T. Co.* 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301, holding that where party repudiates his obligation in toto advance of time for performance, other party may hold wrong doer liable in damages; *General Bill Posting Co. v. Atkinson* [1909] A. C. 118, 1 B. R. C. 497, 78 L. J. Ch. N. S. 77, 99 L. T. N. S. 943, 25 Times L. R. 178, holding that employee was no longer bound by restriction as to trade, where he was dismissed before expiration of period of employment, the contract of employment providing against entering trade after expiration of term; *Paterson Timber Co. v. Canadian P. Lumber Co.* 15 B. C. 225, holding that under contract to deliver logs in installments assent of purchaser to breach of contract will prevent him from taking advantage of breach; *Sawyer v. Pringle*, 18 Ont. App. Rep. 218, holding that upon seizure and resale of article sold on conditional sale original contract is extinguished, and nonaction lies for deficiency.

Remedy in case of breach of mutual covenant.

Cited in *Haydon v. St. Louis & S. F. R. Co.* 117 Mo. App. 76, 93 S. W. 833, holding that rescission is not warranted by breach of independent covenant the proper remedy being action for damages.

Intention of parties as to written contract as controlling construction.

Cited in *Osborne v. Cabell*, 77 Va. 462; *Robinson v. Stow*, 39 Ill. 568,—hold-

ing that intention of parties to written contract may be construed by reference to surrounding circumstances as well as by words used in contract.

Liability for expense for transfer of stock.

Cited in *Boulton v. Hugel*, 35 U. C. Q. B. 402, holding that party who agrees to transfer shares of stock but neglects to do so on date named must at his own expense prepare transfer of them.

Earnest money as part of price.

Cited in *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306, holding that earnest money, within the meaning of the statute of frauds, is regarded as part payment of the price.

Conclusiveness of recital as to seal.

Cited in *Martin v. Barnes*, 5 N. S. 291 (dissenting opinion), on import of recital that hands and seals are attached.

18 E. R. C. 609, *BOONE v. EYRE*, 1 H. Bl. 273, note, 2 W. Bl. 1312, 2 Revised Rep. 768.

Covenants dependent or independent.

Cited in *Bangs v. Lowber*, 2 Cliff. 157, Fed. Cas. No. 840, holding that clause in charter-party that "vessel was to proceed from Milbourne to Calcutta with all possible dispatch" was independent stipulation; *Stokes v. Baars*, 18 Fla. 656, holding that contract to deliver timber at so much per foot, to be inspected, and to be delivered as fast as water will permit, and to be completed at certain date, is entire and not severable contract; *Bryan v. Fisher*, 3 Blackf. 316, holding that failure of landlord to direct building as agreed upon in lease is no bar to collection of rent; *Lloyd v. Jewell*, 1 Me. 352, 10 Am. Dec. 73, holding that in action on note given for purchase price of land it is not competent for defendant to set up, as defense, partial failure of title; *Whitney v. Lewis*, 21 Wend. 131, holding that where party has received benefit under contract, though less than expected, he cannot rescind it; *Watters v. Smaw*, 32 N. C. 292, holding that breach of covenant to repair cannot be pleaded as defense to action for rent; *Andrews v. Moore*, 7 Appan. (Ohio) 183, holding that covenant to sell land, upon payment of certain sum, and covenant to make payment at certain times are independent covenants; *King Philip Mills v. Slater*, 12 R. I. 90, 34 Am. Rep. 603, holding that plaintiff having failed in first deliveries of goods which he contracted to manufacture and deliver, in successive lots, cannot compel acceptance of goods subsequently manufactured and offered; *Lewis v. Weldon*, 3 Rand. (Va.) 71, holding that where contract is made to deliver crop of wheat at barn of seller, before certain day and purchaser is to pay for it some months after delivery, covenants are dependent; *Chrisholm v. Chrisholm*, 2 D. L. R. 57, holding that where a testator agreed to pay so long as he was able an annuity to his daughter-in-law so long as she was self-dependent and to his granddaughter until the latter reached the age of 21 years, he to be the guardian of the child, the covenants to pay the annuity was an independent one, and his estate was liable thereon.

Cited in note in 30 L.R.A. 36, 45, 69, on right to rescind or abandon contract because of other party's default.

Cited in 1 Beach, Contr. 116, on covenants construed as dependent; 2 Mechem, Sales, 713, on question whether assertion by seller was a mere representation or designed to be a term of the contract of the sale as a question for the jury; *Hollingsworth*, Contr. 441, on necessity that performance be in accordance with

terms of contract to operate as a discharge; Hollingsworth, Contr. 511, on breach of subsidiary promise by one party as discharge of other party.

Conditions precedent.

Cited in *Knight v. New England Worsted Co.* 2 Cush. 271, holding that making assignment is not condition precedent to entitle seller to recover payment for goods, under agreement to take lease of certain premises and stock therein at certain price, and to assign lease by instrument in writing; *Roberts v. Marston*, 20 Me. 275, 37 Am. Dec. 52, holding that if party accepts of agreement from which he is to derive benefit, when he shall have performed act on or before certain day, such acceptance is equivalent to affirmative agreement to perform act by stated time, and original agreement is not condition precedent; *Conner v. Atwood*, 57 Me. 100, holding that clause in contract to effect that party would have free access to books of firm for certain purposes, was not condition precedent to enforcement of stipulation to procure release of right of former partner in assets of former firm; *Reformed Protestant Dutch Church v. Bradford*, 8 Cow. 457, to the point that if covenant goes to whole consideration, it is a condition precedent; *Bennet v. Prixley*, 7 Johns. 249, holding that where mutual covenants go only to part of consideration, and breach of that part may be paid in damages defendant cannot set it up as condition precedent; *Barhydt v. Ellis*, 45 N. Y. 107, holding that stipulation in lease to give notice to surety of non-payment of rent was not condition precedent; *Mayo v. Mayo*, 9 N. C. (2 Hawks) 329, holding that if one party covenants to do one thing, the other doing another, it is mutual covenant and not condition precedent; *Hutcheson v. McNutt*, 1 Ohio, 14, holding that payment of expenses was condition precedent under contract executed by one party only, stipulating to convey certain lands, other party being at half the expense, for procuring title; *Taylor v. Gallup*, 8 Vt. 340, holding that conditions precedent must appear to be such by express terms of contract, or by necessary implication, or they will be held independent covenants.

Cited in *Hollingsworth*, Contr. 493, 495-497, on right to recover for breach of contract by one who has not performed in case of divisible performance.

Mutual covenants as conditions precedent.

Cited in *Lowber v. Bangs*, 2 Wall. 728, 17 L. ed. 768 (dissenting opinion), on mutual covenants as condition precedent where they go to whole consideration for contract; *Bean v. Atwater*, 4 Conn. 3, 10 Am. Dec. 91, holding covenant for part payment prior to conveyance is independent but covenant to pay balance upon conveyance is dependent; *Bedell v. Christ's Church*, 8 N. B. 217, holding covenant for renewal of lease or for purchase of improvements was mutually dependent on covenant for lessor's right to re-enter on termination; *Wright v. Polson*, 30 N. S. 437, holding that failure of plaintiff to pay as agreed did not excuse defendant from obligation to complete wagons under contract; *Gray v. Schooley*, 43 U. C. Q. B. 209, holding that in contract to go to certain port and carry cargo of salt provided first party would guarantee certain depth of water in harbor, latter condition is precedent; *Hall v. Cazenove*, 14 E. R. C. 737, 4 East, 477, 7 Revised Rep. 611, 1 Smith, 272, holding that though delay of carrier may be ground for recovery of damages it does not excuse payment of freight; *Behn v. Burness*, 6 E. R. C. 492, 32 L. J. Q. B. N. S. 204, 3 Best & S. 751, 9 Jur. N. S. 620, 8 L. T. N. S. 207, 11 Week. Rep. 496, on distinction between conditions precedent and warranties; *Glazebrook v. Woodrow*, 8 T. R. 366, 4 Revised Rep. 700, holding that of covenants to give possession and upon receipt of price to convey, the material part is the covenant to convey, per-

formance of which is a condition precedent to payment; *Inman S. S. Co. v. Bischoff*, L. R. 7 App. Cas. 670, 52 L. J. Q. B. N. S. 169, 47 L. T. N. S. 581, 31 Week. Rep. 141, 5 Asp. Mar. L. Cas. 6, on performance as condition precedent to payment; *Lloyd v. Lloyd*, 2 Myl. & C. 192, 6 L. J. Ch. N. S. 135, 1 Jur. 69, holding that covenants by respective parents of prospective bride and groom to settle upon the couple if married certain estates, are independent of each other.

Referred to as leading case and distinguished in *Bastin v. Bidwell*, L. R. 18 Ch. Div. 238, 44 L. T. N. S. 742, holding that lessee's covenant to paint and repair building during term was condition precedent to lessors covenant to renew the lease.

Distinguished in *Hoare v. Rennie*, 5 Hurlst. & N. 19, 29 L. J. Exch. N. S. 73, 8 Week. Rep. 80, holding that delivery at each instalment of full quantity of goods as agreed is condition precedent to continuance of contract to accept future instalments.

— As governed by intention.

Cited in *Tipton v. Feitner*, 20 N. Y. 423, holding that it is question of intention, whether several parts of a contract, made at one and same time are to be considered independent; *Todd v. Summers*, 2 Gratt. 167, 44 Am. Dec. 379, holding that covenants though dependent in form, should be construed as mutual and independent, when necessary to effect justice between parties thereto.

— Where going to whole consideration.

Cited in *Heaston v. Krieg*, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805, holding that a condition is not to be implied from the mention of a consideration which does not go to the whole consideration; *Hunt v. Tibbetts*, 70 Me. 221; *Union P. R. Co. v. Travelers' Ins. Co.* 28 C. C. A. 1, 49 U. S. App. 752, 83 Fed. 676.—holding that where dependent covenant goes to whole consideration of contract injured party has right to treat entire contract as broken and to recover damages for total breach; *Trimble v. Green*, 3 Dana. 353, holding a bare covenant to convey land is not such part performance as will render performance an unnecessary allegation in suit for the price; *Woodworth v. Curtiss*, 7 Wend. 112 holding on independence of covenants going to only part of consideration; *Dakin v. Williams*, 11 Wend. 69, holding that covenant to pay specified price for a business and vendor's bond not to resume the same kind of business are mutually dependent covenants; *Brown v. Nelson*, 7 Ont. Rep. 90, holding that when a mutual covenant goes only to a part of the consideration, and a breach may be paid for in damages it is not a condition precedent; *St. Albans v. Shore*, 1 H. Bl. 270, holding that a covenant to convey title goes to the whole consideration and complete and valid conveyance becomes a condition precedent.

Distinguished in *Chanter v. Leese*, 4 Mees. & W. 311, holding that where there has been no performance whatever the breach goes to the whole consideration.

—Where going to part of consideration.

Referred to as leading case in *Tothergill v. Walton*, 8 Taunt. 576, 2 J. B. Moore, 630, 20 Revised Rep. 567, holding that a stipulation in a contract for an entire voyage that certain freight should be picked up and discharged at designated intermediate points was independent.

Cited in *Sayre v. Craig*, 4 Ark. 10, 37 Am. Dec. 757, holding covenant to pay was independent where part of consideration was executed by giving possession while conveyance remained to be made; *Hickman v. Royle*, 55 Ind. 551, to the point that where whole of agreement does not go to consideration on both sides and where supposed condition is distinctly separable from other parts of agreement, stipulation is independent; *Knight v. New England*

Worsted Co. 2 Cush. 271; *Water Lot Co. v. Leonard*, 30 Ga. 560,—holding that mutual covenants are independent when they go to part only of consideration of contract; *Haydon v. St. Louis & S. F. R. Co.* 222 Mo. 126. 121 S. W. 15; *Gannon v. Riddle*, 139 Mo. App. 584, 123 S. W. 486; *Roberts v. Marston*, 20 Me. 275, 37 Am. Dec. 52,—holding that covenant is not condition precedent unless consideration therefor goes to whole of contract; *Rice v. Sims*, 2 Bail L. 82, holding that contracts are not mutual conditions, when each goes only to part of consideration of other, and breach of either may be compensated in damages; *Day v. Essex County Bank*, 13 Vt. 97, holding that covenants which do not constitute the consideration for each other are independent; *Kauffman v. Raeder*, 54 L.R.A. 247, 47 C. C. A. 278, 108 Fed. 171, holding that agreement to relinquish, upon payment therefor, certain stock accepted in lieu of rentals does not go to the entire consideration; *Central Appalachian Co. v. Buchanan*, 20 C. C. A. 33, 43 U. S. App. 265, 73 Fed. 1006, on independence of covenants going to part consideration only; *Seeger v. Duthie*, 8 C. B. N. S. 45, 30 L. J. C. P. N. S. 65, 7 Jur. N. S. 239, 9 Week. Rep. 166, holding that various stipulations in a charter party as to details of performance were independent covenants; *MacAndrew v. Chapple*, L. R. 1 C. P. 643, 35 L. J. C. P. N. S. 281, 14 L. T. N. S. 556, 14 Week. Rep. 891, holding that a stipulation in a charter party to proceed “with all convenient speed” is an independent covenant; *Davidson v. Gwynne*, 12 East, 381, 11 Revised Rep. 420, holding that a stipulation in a contract for a voyage that vessel should sail with first convoy was not a condition precedent; *Ritchie v. Atkinson*, 10 East, 295, holding that stipulation that cargo to be loaded was to be a complete cargo was not a condition precedent and vessel might recover for transporting partial cargo actually loaded; *Carpenter v. Cresswell*, 4 Bing. 409, 1 Moore & P. 66, 6 L. J. C. P. 27, 29 Revised Rep. 587, holding that covenant by vendor of mercantile business not to interfere therewith does not go to the whole consideration; *Franklin v. Miller*, 4 Ad. & El. 599, holding that failure to pay certain agreed instalments is no ground for rescinding the whole contract.

Distinguished in *Evans v. Harris*, 19 Barb. 416, pointing out that the rule as to part consideration applies only to prevent injustice; *Grant v. Johnson*, 5 N. Y. 247, holding that the intent of the parties controls and that not all contracts going to part consideration are necessarily independent; *Strohecker v. Barnes*, 17 Ga. 340, holding that assuming possession of leased premises is not such partial performance as will waive repairs as condition precedent to paying rent; *Wilson v. Finch-Hatton*, L. R. 2 Exch. Div. 336, 46 L. J. Exch. N. S. 489, 36 L. T. N. S. 473, 25 Week. Rep. 537, holding the obligation to have a leased apartment tenantable was a condition precedent to the lease although not going to the whole consideration; *Merritt v. Ellis*, 1 N. B. 457, holding shipowner who failed to pay as agreed at particular stages of building could not maintain action for failure to complete vessel.

—Where breach may be paid for in damage.

Referred to as leading case is *Stavers v. Curling*, 3 Bing. N. C. 355, 6 L. J. C. P. N. S. 41, 3 Scott, 740, 2 Hodges, 237, holding that intent that breach of stipulations as to manner of voyage should be a matter for compensation in damages renders such covenants independent of covenant to pay for services of vessel.

Cited in *Philip Hiss Co. v. Piteairn*, 107 Fed. 425, 31 Pittsb. L. J. N. S. 311, holding that under agreement to decorate walls, ceiling and woodwork of room at agreed price, defects in work remediable at certain cost, should not preclude recovery of contract price less deduction for defects; *Susswein v. Pennsylvania*

Steel Co. 184 Fed. 102; Central Appalachian Co. v. Buchanan, 20 C. C. A. 33, 43 U. S. App. 265, 73 Fed. 1006; Weaver v. Childress, 3 Stew. (Ala.) 361; Key v. Henson, 17 Ark. 254; Morris v. Stevenson, 10 Del. Co. Rep. 294; Austin v. Hughes, 5 Kulp, 225; Campan v. Chene, 1 Mich. 400; Bishop v. Stewart, 13 Nev. 25; Robinson v. Crowinshield, 1 N. H. 76; Luce v. New Orange Industrial Asso. 68 N. J. L. 31, 52 Atl. 306; Evans v. Harris, 19 Barb. 416; Knipe v. Koch, 26 Lanc. L. Rev. 188; Danville Bridge Co. v. Pomroy, 15 Pa. 151; Noble v. James, 2 Grant, Cas. (Pa.) 278; Ligget v. Smith, 3 Watts, 331, 27 Am. Dec. 358; Law v. House, 3 Hill, L. 268; Fenton v. Clark, 11 Vt. 557; Nelson v. Oren, 41 Ill. 18,—holding that where covenant goes only to part of consideration on both sides, and breach of such covenant may be paid for in damages, it is independent covenant; McGregor v. Ross, 96 Mich. 103, 55 N. W. 658, holding that if there is only partial failure of performance by one party to contract, for which there may be compensation in damages, contract is not put an end to; Schofield v. Carvill, 21 N. B. 558, on independence of covenants when measurable in damages; Miller v. Thompson, 16 U. C. C. P. 513, holding that where consideration is divisible plaintiff's failure in one particular does not bar action on defendant's covenant if defendant has an adequate remedy in damages; Societe General de Paris v. Milders, 49 L. T. N. S. 55, holding that where the breach may be compensated in damages rescission is not warranted thereby.

Necessity of performance of contract.

Cited in United States use of Hudson River Stone Supply Co. v. Molloy, 11 L.R.A.(N.S.) 487, 75 C. C. A. 283, 144 Fed. 321, holding that where plaintiff's delivery of stone to defendant was not in accordance with terms of their contract but defendant accepted and used them, plaintiff was entitled to recover on quasi contract for value of stone actually delivered: Rives v. Batiste, 25 Ala. 382, holding that where payment of money, secured by penal bond, is made to depend on performance of condition precedent, action cannot be maintained on bond until condition has been fully performed; Matheson v. Wharton, 89 Hun. 409, 35 N. Y. Supp. 417, holding that failure to perform substantial covenants bars action by party in default; Johnson v. Dunn, 51 N. C. (6 Jones, L.) 125, holding that where one covenanted to hire slaves, in pairs as sawyers, at so much per month, to be delivered on given days, and he failed to deliver them on days stated, but afterwards two of the pairs were produced and accepted, and one pair was not produced at all, recovery might be had for services performed by slaves; Pressy v. McCormack, 235 Pa. 443, 84 Atl. 427, holding that unless there is substantial performance of contract there can be no recovery.

Cited in Keener, Quasi-Contr. 221, on right of recovery by party in default under contract when breach is wilful.

Excuse for non-performance of contract.

Cited in Mill Dam Foundry v. Hovey, 21 Pick. 417, holding that failure to perform independent stipulation, not amounting to condition precedent does not excuse opposite party from performance of all stipulations on his part; West v. Beehtel, 125 Mich. 144, 51 L.R.A. 791, 84 N. W. 69, holding that failure to pay for each carload of wood as delivered in accordance with agreement is no excuse for failure to deliver wood as agreed; Culey-Miller Coal Co. v. Freund Packing & Mfg. Co. 138 Mo. App. 274, 120 S. W. 658, holding that breach of independent covenant gives rise to cause of action; Laswell v. Nation Handle Co. 147 Mo. App. 497, 126 S. W. 969, holding that mere failure to pay money when due will not warrant him to whom it is due to no longer keep his engagement; General Bill Posting Co. v. Atkinson [1909] A. C. 118, 1 B. R. C. 497, 78 L. J. Ch. N. S. 77, 99 L. T. N. S. 943, 25 Times L. R. 178, holding that employee was

no longer bound by restriction as to trade, where he was dismissed before expiration of period of employment, which provided against entering into trade after expiration of term.

Necessity of alleging performance or readiness to perform.

Cited *McLaughlin v. Hutchins*, 3 Ark. 213; *Greene v. Linton*, 7 Port. (Ala.) 133, 31 Am. Dec. 707,—holding that where covenants are mutual and dependent, plaintiff must aver performance before he can be entitled to recover; *Keller v. Reynolds*, 12 Ind. App. 383, 40 N. E. 73; *Krog v. Rice*, 1 Speers, L. 333,—holding that performance need not be alleged, where covenant goes only to part of consideration on both sides and breach of such covenant may be paid for in damages, as it is not regarded as condition precedent; *Boulton v. Hugel*, 35 U. C. Q. B. 402, holding that vendor must allege readiness to perform in action for purchase but need not tender deed.

Sufficiency of pleading.

Cited in *Drouin v. Wilson*, 80 Vt. 335, 67 Atl. 825, 13 Ann. Cas. 93, holding that in action on covenant, plea non fregit conventionem is sufficient to maintain verdict.

18 E. R. C. 621, *BLYTH v. BIRMINGHAM WATERWORKS CO.* 11 Exch. 781, 2 Jur. N. S. 333, 25 L. J. Exch. N. S. 212, 4 Week. Rep. 294.

Definition of negligence.

Cited in *Union P. R. Co. v. Rollins*, 5 Kan. 167; *Putney v. Keith*, 98 Ill. App. 285,—holding that negligence is opposite of care and prudence,—an omission to use means reasonably necessary to avoid injury; *Canada Woollen Mills v. Traplin*, 35 Can. S. C. 424; *New Westminster v. Brighthouse*, 20 Can. S. C. 520; *Fuller v. Atlantic Coast Line R. Co.* 140 N. C. 480, 53 S. E. 297; *Lauritsen v. American Bridge Co.* 87 Minn. 518, 92 N. W. 475; *L. Wolff Mfg. Co. v. Wilson*, 46 Ill. App. 381; *Southern R. Co. v. Chatman*, 124 Ga. 1026, 6 L.R.A.(N.S.) 283, 53 S. E. 692, 4 Ann. Cas. 675; *Jones v. East Carolina R. Co.* 142 N. C. 207, 55 S. E. 147; *Garlick v. Dorsey*, 48 Ala. 220,—on the definition of negligence; *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529, holding that negligence is opposed to diligence or carefulness and is never absolute or intrinsic but is always relative to some circumstance of time, place or person; *Chicago, B. & Q. R. Co. v. Dougherty*, 12 Ill. App. 181, holding that negligence is the want or absence of that degree of care and attention required by all the circumstances of each particular case in which the question may arise; *Hand v. Central Pennsylvania Teleph. & Supply Co.* 1 Lack. Leg. News, 351, on distinction between gross negligence and ordinary negligence; *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941, holding the instruction defining negligence to be "the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or do something which an ordinarily prudent man would not do," was substantially correct; *Carter v. Cape Fear Lumber Co.* 129 N. C. 203, 39 S. E. 828, holding that negligence at law cannot exist except in cases where there has been a want of ordinary care; *Whisenant v. Southern R. Co.* 137 N. C. 349, 49 S. E. 559, holding that there cannot be culpable negligence where party charged with negligence owes no duty; *Canada Southern R. Co. v. Phelps*, 14 Can. S. C. 132, on negligence being an omission to act as a reasonable man guided by considerations which ordinarily regulate the conduct of human affairs or, doing something which a prudent man would not do.

Cited in note in 41 L.R.A. 35, on knowledge as element of employer's liability.

Cited in 1 Thompson, Neg. 2; 2 Cooley, Torts, 3d ed. 1325,—on what constitutes negligence.

Distinguished in Fuller v. Pearson, 23 N. S. 263, where a thing of harmful nature was operated on defendant's land.

—Correlation of duty and neglect.

Cited in Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 498, holding that a railroad company is not liable for death of passenger riding on a pass exempting company from liability unless it be shown that the company is guilty of wanton or wilful negligence evidenced by want of due care.

Degree of care or negligence.

Cited in Matson v. Maupin, 75 Ala. 312, holding the measure of care exacted to be in accordance with what prudent and cautious men usually do in like circumstances and on failure to do which they are no longer prudent and cautious; Hoard v. State, 80 Ark. 87, 95 S. W. 1002, holding that in order to determine negligence or due care one must compare the conduct with what would be expected of a man of ordinary sense and prudence placed under same circumstances; Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512, holding that it must appear that the person injured used ordinary care such as a reasonably prudent man would use for the protection of his person and in the absence of such care no recovery may be had; Southern R. Co. v. King, 87 C. C. A. 284, 160 Fed. 332, holding an instruction that "the care required is such that an ordinarily prudent person 'would exercise' is equivalent to 'should exercise;'" McPherson v. St. John, 32 N. B. 423, holding that where question of negligence is before jury a direction that there is no culpable negligence is a direction for verdict because to constitute actionable negligence there must be breach of duty and actionable negligence is culpable negligence.

Ordinary care.

Cited in Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 159, on ordinary care and the duty imposed to exercise such care; Wells v. New York C. R. Co. 24 N. Y. 181, on formal division of negligence in the abstract; Houston & G. N. R. Co. v. Parker, 50 Tex. 330, holding that ordinary care is such care as is usually exercised under like circumstances by men of ordinary prudence in their own affairs.

Care to prevent accidental injury or damage.

Cited in Southern R. Co. v. Carter, 164 Ala. 103, 51 So. 147, holding that whether or not sudden starting of engine which injured plaintiff was negligent depends on knowledge of engineer of position of person injured; Perryman v. Chicago City R. Co. 145 Ill. App. 187, holding that where child ran into side of street car passing across street, railroad company cannot be held guilty of negligence; Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391, holding that the duty of defendant was to use only such reasonable precautions to prevent accidents as would have been adopted by prudent persons prior to the accident; Louisville, N. A. & C. R. Co. v. Lucas, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968, holding that company was negligent in maintaining a platform without lights or guards and for not foreseeing and guarding against what did occur; Sandoval v. Territory, 8 N. M. 573, 45 Pac. 1125, holding that defendant was not negligent in causing death by having a gun in his possession at a desolate place in the night time fifteen miles from settlement where deceased rushed upon him and in a scuffle for possession of gun he was killed; Parrott v. Knickerbocker Ice Co. 2 Sweeny, 93, holding that sailing vessel has

no right to neglect all proper precaution, and then throw responsibility of accident upon steamer with which it collided; *Campbell v. Great Western R. Co.* 15 U. C. Q. B. 498, holding that defendants though not bound to stop their train to drive off cattle, must exercise proper care by slowing up to avoid running over them; *Brown v. Great Western R. Co.* 40 U. C. Q. B. 333, holding that it is the duty of railway operators to apply air brakes in sufficient time to enable them to use the other brakes to avoid injury in case the air does not work; *Jager v. Adams*, 123 Mass. 26, 25 Am. Rep. 7, holding that the laying of brick on a wall is eminently dangerous to those below and that a failure to provide protection therefor is an omission that a prudent man would not make; *Bleiwise v. Pennsylvania R. Co.* 81 N. J. L. 160, 78 Atl. 1058, holding that injury caused by fall of car window of passenger train could not be said to be result of negligence of company in inspecting where it was properly inspected on morning of day accident occurred; *Carter v. Cape Fear Lumber Co.* 129 N. C. 203, 39 S. E. 828, holding that slight defects in appliances causing injuries which cannot reasonably be anticipated, do not render owner of machinery liable; *Chicago, R. I. & P. R. Co. v. Moore*, 36 Okla. 450, 43 L.R.A.(N.S.) 701, 129 Pac. 67, holding that fireman could recover for injury caused by breaking of shaft of engine where engine was sent out in defective condition and without inspection, if inspection would have disclosed defect; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14, holding that in exercise of his lawful rights, every person has right to presume that every other person will perform his duty and obey law; *Kellett v. British Columbia Marine R. Co.* 16 B. C. 198, holding that servant could not recover for injury which was result of negligence of foreman, who was fellow servant; *Winnipeg Oil Co. v. Canadian Northern R. Co.* 21 Manitoba L. Rep. 274, holding that no contributory negligence on part of owner, unless it is wanton is available as defense by railroad setting fires.

— In management of water conductors.

Cited in *Gould v. Winona Gas Co.* 100 Minn. 258, 10 L.R.A.(N.S.) 889, 111 N. W. 254, on the liability of a water main company being based on negligence as distinguished from liability of an insurer; *Northwood v. Raleigh Twp.* 3 Ont. Rep. 347, holding that a failure to provide a proper outlet to a drainage system through plaintiff's land was an omission amounting to negligence.

Cited in notes in 15 L.R.A.(N.S.) 548, on liability for escape of dangerous substance stored on premises; 61 L.R.A. 59, 60, on establishment and regulation of municipal water supply.

Cited in 1 *Farnham, Waters*, 826, on duties and liabilities of water company; 3 *Dillon, Mun. Corp.* 5th ed. 1911, on water company's liability for negligent escape of water from pipes.

Care in choice of appliances.

Cited in *Garfield v. Toronto*, 22 Ont. App. Rep. 128, on duty to provide new and larger appliances where those furnished were sufficient and well designed.

Accident as distinguished from negligence in cause of injury.

Cited in *William Grace Co. v. Gallagher*, 137 Ill. App. 217, on accident; *Hunter v. Kansas City & M. R. & Bridge Co.* 29 C. C. A. 206, 54 U. S. App. 653, 85 Fed. 379, holding that where person was injured by fellow employee by his slipping and releasing hold on a post because of slippery state of ground, it was a case of accident, negligence not being present; *Hinman v. Winnipeg Electric Street R. Co.* 16 Manitoba L. Rep. 16, holding that if the consequences of an act which could not be foreseen by an ordinarily prudent man, cause damage, no liability results.

Cited in 6 Thompson, Neg. 624, on inapplicability of rule *res ipsa loquitur* to inevitable accident; 4 Elliott, Railr. 2d ed. 391, on what is an accident to a passenger.

Statutory excuse.

Cited in note in 1 Eng. Rul. Cas. 302, on nonliability of public associations or corporations for accidents occurring through use of statutory powers.

Extraordinary circumstances precluding negligence.

Cited in *Deford v. State*, 30 Md. 179, holding that if a wall of building were erected in ordinarily substantial and secure manner, and was overthrown by operation of extraordinary causes, against which foresight could not provide owner thereof would not be liable for injury caused by fall; *Raiford v. Wilmington & W. R. Co.* 130 N. C. 597, 41 S. E. 806, holding that one is not liable for an injury that he could not foresee, where there is no lack of reasonable and due care; *Strawbridge v. Philadelphia*, 2 Pennyp. 419, on damage caused by the effect of extraordinary conditions on the operation of a business authorized by statute and operated in pursuance therewith; *Hutchinson v. Boston Gaslight Co.* 122 Mass. 219, holding that the escape of gas caused by falling of heavy buildings and excessive heat was not result of negligence and that care was used was adequate to all the reasonable exigencies of the business; *Wood v. Third Ave. R. Co.* 13 Misc. 308, 34 N. Y. Supp. 698, holding that the use of man hole covers with a small hole in centre for purpose of lifting was not negligence so as to hold user liable for a fall occasioned by slipping of a crutch ferrule through the hole the event being beyond anticipation; *Nitro-Glycerine Case (Parrott v. Wells)* 15 Wall. 524, 21 L. ed. 206 (affirming *Parrott v. Barney*, 2 Abb. U. S. 197, Fed. Cas. No. 10,773), holding that common carriers, in taking a case of nitro-glycerine into their place of business in ordinary course of business not knowing nature of contents of case are not responsible for resulting injury on grounds of negligence; *Langstaff v. McRae*, 22 Ont. Rep. 78, holding that the construction of a boom near a bridge which broke by reason of a flood causing a jam at the bridge and overflowing plaintiff's land was not negligence; *McMillan v. Southwest Boom Co.* 17 N. B. 715, holding that a boom company cannot be held liable for obstructing navigation when such event was caused by extraordinary weather conditions; *The Chase, Young*, Adm. Dec. 113, holding that where a ship causes damage in an extraordinary storm, to excuse the owners from negligence adequate precautions under the circumstances must have been taken; *Sullivan v. McWilliam*, 20 Ont. App. Rep. 627, holding that where defendant's servant laid down reins while getting out of wagon, to tie horse and a sudden noise made horse run away, there being no evidence of reason why any more care should have been used, the act was not negligent; *Smith v. London & S. W. R. Co.* 18 E. R. C. 726, L. R. 6 C. P. 14, 40 L. J. C. P. N. S. 21, 23 L. T. N. S. 678, 19 Week. Rep. 230, holding that company is not responsible for burning of plaintiff's property, the ultimate result of the fire being beyond their anticipation.

Cited in 5 Thompson, Neg. 378, on nonliability of municipality for consequences of extraordinary floods; 1 Thompson, Neg. 15, on liability for injuries proceeding from source for which neither party is responsible.

Negligence distinguished from liability of an insurer.

Cited in *Rowell v. Railroad Co.* 57 N. H. 132, 24 Am. Rep. 59, holding that in an action against a railroad for starting a fire, the question of contributory negligence did not arise where by statute the liability of railroad was fixed as that of an insurer; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L.

ed. 611, 17 Sup. Ct. Rep. 243, holding that where fire is caused by locomotive engine under the statute of absolute liability, negligence need not be proven: *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 57 Fed. 441, holding that where a culvert and embankment were built by statutory power, the doctrine of insurer's liability did not apply, but negligence must be shown: *Fraser v. Pere Marquette R. Co.* 18 Ont. L. Rep. 589, on liability of railroad companies as insurers with respect to fires started by locomotives; *Noble v. Toronto*, 46 U. C. Q. B. 519, holding that the fact of the flooding was not of itself negligence but that actual negligence must be shown causing the flood.

Application of doctrine of negligence to corporations.

Cited in *Foxworthy v. Hastings*, 23 Neb. 772, 37 N. W. 657, holding that negligence is the same offense, want of due diligence whether the party at fault is an individual or a public or private corporation and therefore that the same limitation of action should apply to one as to the other.

Cited in 1 *Nellis, Street Rys.* 2d ed. 476, on what constitutes negligence of street railway company.

Negligence as fact question.

Cited in *McCallum v. Grand Trunk R. Co.* 31 U. C. Q. B. 527, on the question as to whether there was any evidence to go to the jury.

Presumption of negligence.

Cited in *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, holding that where traveller is injured at railroad crossing law raises presumption that fault was his own, and he must rebut presumption before he can recover.

Liability of tenant for waste.

Cited in *Parrott v. Barney*, 2 Abb. (U. S.) 197, Fed. Cas. No. 10,773, holding that tenant is liable to landlord for all waste, by whomsoever committed.

Cases which may be drawn from consideration of jury.

Cited in *Black, Proof & Pl. Accident Cas.* 117, on cases which have been withdrawn by the court from the jury.

18 E. R. C. 630, *PURVES v. LANDELL*, 12 Clark & F. 91.

Liability of attorney for negligence in performance of duty.

Cited in *Pearson v. Darrington*, 32 Ala. 227, holding that attorney is not liable for failure to reserve a bill of exceptions so that he may not collect his fee: *Estate of A. B. 1 Tucker*, 247, holding an attorney liable for erroneous advice given in ignorance of changes in statute law.

Cited in notes in 52 L.R.A. 889, on liability of attorney to client for mistake; 24 E. R. C. 663, on liability of solicitor.

Cited in 2 *Cooley, Torts*, 3d ed. 1387, as to when client can maintain an action against professional adviser for negligence: *Weeks, Attys.* 2d ed. 594, on necessity for client proving negligent act charged against attorney; *Weeks, Attys.* 2d ed. 573, 583, 585, on negligence or lack of skill for which attorney is liable to client; 1 *Beach, Contr.* 797, on implied contracts of professional men.

Degree of diligence required by professional men.

Cited in *Gambert v. Hart*, 44 Cal. 542, holding that an attorney must use diligence and skill of the ordinary attorney and it is a want of such skill for an attorney to move for new trial before statement in support thereof is certified; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388, holding that a doctor undertakes to possess and use a degree of skill that is reasonable, fair

and competent, not being warrantor of cure; *Chapman v. Boulton*, 13 U. C. C. P. 372, holding that evidence of the attorney's negligence must be given and gross negligence must be proven; *Stafford Twp. v. Bell*, 31 U. C. C. P. 77, on degree of care required from attorneys in performance of their professional duties.

18 E. R. C. 643, *BEAL v. SOUTH DEVON R. CO.* 3 Hurlst. & C. 337, 5 Hurlst. & N. 875, 29 L. J. Exch. N. S. 441, 11 L. T. N. S. 184, 12 Week. Rep. 1115.

Degrees of diligence and negligence.

Cited in *Belt R. Co. v. Banicki*, 102 Ill. App. 642, holding that gross negligence and great negligence are relative terms, one is same as other, and each is descriptive of other; *Maslin v. Baltimore & O. R. Co.* 14 W. Va. 180, 35 Am. Rep. 748; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 Am. Rep. 719,—on degrees of diligence required; *Stafford v. Bell*, 31 U. C. C. P. 77 (dissenting opinion), on degrees of negligence as defining measure of liability.

Cited in 1 *Thompson*, Neg. 20, on judicial expressions as to degrees of negligence.

—“Gross” negligence.

Cited in *Chicago, R. I. & P. R. Co. v. Hamler*, 215 Ill. 525, 1 L.R.A.(N.S.) 674, 106 Am. St. Rep. 187, 74 N. E. 705, 1 Ann. Cas. 42, on nonrecognition of degrees in negligence as matter of law; *Charlotte Trouser Co. v. Seaboard Air Line R. Co.* 139 N. C. 382, 51 S. E. 973, on “gross negligence” as being a relative term meaning a greater want of care than is implied by the term “ordinary negligence;” *Western U. Teleg. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500, on distinction between gross negligence and negligence merely; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 5 Legal Gaz. 413, holding that whatever name it is given, negligence is a failure to bestow the care and skill which the situation demands and hence it is more accurate to call it simply negligence; *Purple v. Union P. R. Co.* 57 L.R.A. 700, 51 C. C. A. 564, 114 Fed. 123, holding that it is not error to refuse to charge liability for “gross” negligence, “gross” being merely an epithet, distinguishing no legal degree of negligence; *Milwaukee & St. P. R. Co. v. Arms*, 91 U. S. 489, 23 L. ed. 374, holding that gross negligence is relative term and means absence of care that was necessary under the circumstances; *F. T. James Co. v. Dominion Exp. Co.* 13 Ont. L. Rep. 211, holding that a failure to provide a safe and rapid transit as per contract was gross negligence such negligence being merely that want of of reasonable care, skill and expedition which might be reasonably expected; *Grill v. General Iron Screw Colliery Co.* L. R. 1 C. P. 600, 35 L. J. C. P. N. S. 321, 12 Jur. N. S. 727, 14 L. T. N. S. 711, 14 Week. Rep. 893, holding that where judge did not ask jury if defendant was guilty of gross negligence but left it to them to say whether defendants had exercised due care, the direction was correct.

Negligence as negative quality.

Cited in *Giblin v. M'Mullen*, L. R. 2 P. C. 318, 38 L. J. C. N. S. 25, 5 Moore, P. C. C. N. S. 434, 21 L. T. N. S. 214, 17 Week. Rep. 445, 3 Eng. Rul. Cas. 613, on “negligence” being a negative word meaning the absence of such care as it was the duty of the defendant to use.

Reasonableness of stipulation against liability for negligence.

Cited in *Rixford v. Smith*, 52 N. H. 355, 13 Am. Rep. 42, on just and reasonable conditions.

—Carrier's contracts.

Cited in *Squire v. New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162, holding that in transportation of hogs under contract stipulating against liability for death in transportation in consideration of cut rates, some of hogs having died from suffocation, the carrier is not liable the stipulation being reasonable; *Southcott v. Montreal S. S. Co.* Newfoundl. Rep. (1874-84) 273, on a special contract of carriage exempting carrier from all liability for negligence of any kind; *Hamilton v. Grand Trunk R. Co.* 23 U. C. Q. B. 600, holding that railroad companies have a statutory right to reasonably limit their common law liability, with which right the courts cannot interfere; *Manchester, S. & L. R. Co. v. Brown*, L. R. 8 App. Cas. 703, 53 L. J. Q. B. N. S. 124, 50 L. T. N. S. 281, 32 Week. Rep. 207, 48 J. P. 388, holding that where shipper had option to send his fish under regular rates or contract rates stipulating against liability for negligence, the stipulations under contract are reasonable; *Dickson v. Great Northern R. Co.* L. R. 18 Q. B. Div. 176, 56 L. J. Q. B. N. S. 111, 55 L. T. N. S. 868, 35 Week. Rep. 202, 51 J. P. 388, 5 Eng. Rul. Cas. 358, holding exemptions from liability for negligence save on payment of an exorbitant charge is unreasonable.

Cited in 1 *Hutchinson*, Car. 3d ed. 413, on necessity that language of contract be explicit to relieve carrier from liability for negligence; 4 *Elliott*, Railr. 2d ed. 461, on validity of stipulation exempting passenger carrier from liability for negligence; 4 *Elliott*, Railr. 2d ed. 191, on contracts limiting liability of carrier.

Degree of diligence of carrier of bailee.

Cited in *Dunn v. Prescott Elevator Co.* 4 Ont. L. Rep. 103, holding that where grain in storage was known to be heated in part and no examination has been made of the rest thereof the neglect so to do is a failure to use the care and skill usual and requisite in the storage business; *Ryckman v. Hamilton, G. & B. Electric R. Co.* 10 Ont. L. Rep. 419, 4 Ann. Cas. 1126, holding that where one undertakes to carry another gratuitously he owes that amount of ordinary care which is required by the circumstances and the injury to plaintiff was due to lack of such care; *Carlisle v. Grand Trunk R. Co.* 25 Ont. L. Rep. 372, 1 D. L. R. 130, holding that railroad company was not liable as carrier for loss of baggage of passenger which was destroyed while in baggage room at end of route, where it was held in storage.

Cited in note in 5 Eng. Rul. Cas. 261, on extent of carrier's liability.

Duties of gratuitous agent to principal.

Cited in *Tiffany*, Ag. 413, on duties of gratuitous agent to principal.

18 E. R. C. 659, *DANIEL v. METROPOLITAN R. CO.* 40 L. J. C. P. N. S. 121, L. R. 5 H. L. 45, 24 L. T. N. S. 815, 20 Week. Rep. 37.

Proximate cause.

Cited in *Heiting v. Chicago, R. I. & P. R. Co.* 252 Ill. 466, 96 N. E. 842, Ann. Cas. 1912D, 451, holding that neglect to fence will be considered proximate cause of accident where it appears that accident would not probably have happened except for failure of railroad company to fence its tracks; *Philadelphia, W. & B. R. Co. v. Stebbing*, 62 Md. 504; *Richards v. Waltz*, 153 Mich. 416, 117 N. W. 193; *McDonald v. Toledo Consol. Street R. Co.* 20 C. C. A. 322, 43 U. S. App. 79, 74 Fed. 104; *Atchison, T. & S. F. R. Co. v. Reesman*, 23 L.R.A. 768, 69 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370,—on omission of duty as proximate cause of injury.

—Presumption and burden of proof.

Cited in *Davidson v. Schuylkill Traction Co.* 4 Pa. Super. Ct. 86, holding that proof of the violation of a speed ordinance by a street car does not attach liability for damage unless it be shown that the breach was the proximate cause; *Shoobrink v. Canada Atlantic R. Co.* 16 Ont. Rep. 515, on the rule that more than an accident on defendant's line of road must be shown to establish connection and negligence; *Williams v. Great Western R. Co.* L. R. 9 Exch. 157, 43 L. J. Exch. N. S. 105, 31 L. T. N. S. 124, 22 Week. Rep. 531, holding that on the evidence that defendant maintained a railroad on the level with a foot-path, that no gates or fences were erected as required by statute, that a four year old child was found lying at crossing with foot cut off, the question of negligence of carrier was raised and should go to the jury; *Dunlap v. The Reliance*, 2 Fed. 249, holding that common carriers are not insurers of lives of passengers, but are bound to use a high degree of care and an explosion of an engine on boat is evidence of negligence under the circumstances.

—Accident in train of events.

Cited in *Fuchs v. St. Louis*, 133 Mo. 168, 34 L.R.A. 118, 34 S. W. 508, holding that where oil from a burning building was turned into a sewer causing an explosion, to establish liability therefor it must be shown from circumstance that there was a reasonable possibility of the explosion, that it was caused by want of some precaution which defendant ought to have taken.

—Question for jury.

Cited in *Heiting v. Chicago, R. I. & P. R. Co.* 162 Ill. App. 403, holding that where different conclusions may be drawn from evidence question as to proximate cause of injury is one of fact to be determined by jury.

What constitutes negligence.

Cited in *Societe Permanente De Construction v. Longtin*, Rap. Jud. Quebec 40 C. S. 55, on it being insufficient to constitute negligence that a careless act was done by defendant whereby plaintiff sustained loss, no duty having been shown to have been broken.

—Negligence in respect to operation of railroad or the like.

Cited in *Stoddard v. New York, N. H. & H. R. Co.* 181 Mass. 422, 63 N. E. 927, holding that a carrier is not liable for injury sustained by railway mail clerk on a car detached from carrier's train on a siding in the central station caused by negligent act of another carrier's servant in running their train against such car; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369, holding that where railroad company neglects to build fence along parkway and a person is injured he may recover for the omission to provide fence if such omission is proximate cause of injury; *Long Island R. Co. v. Killien*, 14 C. C. A. 418, 35 U. S. App. 215, 67 Fed. 365, holding that the act of the boat in which decedent was, in staying close to the other was negligent but that the incompetency of the wheelman in the other was proximate cause of collision; *Jones v. Grand Trunk R. Co.* 45 U. C. Q. B. 193, holding that where there is no evidence that torpedo was placed on track by servant of carrier or that it was in performance of duty or that it was not so placed in a frolic, the carrier cannot be connected with the injury from its explosion; *Newell v. Canadian P. R. Co.* 12 Ont. L. Rep. 21, holding that where boy had entered unfenced yard of carrier and was killed while picking up coal over four hundred yards from place of entrance, such facts do not establish the fact that the omission to fence was the proximate cause of injury.

— Public works producing injury to passengers on nearby railroad.

Cited in *New York, N. H. & H. R. Co. v. Baker*, 50 L.R.A. 201, 39 C. C. A. 237, 98 Fed. 694, holding that where state had taken construction of elevated out of hands of carrier and carrier had put temporary tracks along construction works the carrier is not liable from injury caused to passenger by derrick swinging out over track from construction.

Liability of common carriers.

Cited in *Brown v. Great Western R. Co.* 40 U. C. Q. B. 333; *Commarford v. Empire Limestone Co.* 11 Ont. L. Rep. 119, 5 Ann. Cas. 1012,—on liability of common carrier; *Nichol v. Canada Southern R. Co.* 40 U. C. Q. B. 583; *Toronto Street R. Co. v. Dollery*, 12 Ont. App. Rep. 679,—on liability of common carrier for acts of persons over whom they have no control; *Pounder v. North Eastern R. Co.* [1892] 1 Q. B. 385, 61 L. J. Q. B. N. S. 136, 65 L. T. N. S. 679, 40 Week. Rep. 189, 56 J. P. 247, holding that where at the time of contract for passage the carrier had no notice that passenger was apt to be attacked by illness and that special care must be taken of him, carrier is not liable for injury received in passage even though the servants of carrier in operation on train refused to put him in safe place knowing the condition.

— Duty to take precautions against accident or injury.

Cited in *The Iniziativa*, 6 C. C. A. 346, 14 U. S. App. 496, 57 Fed. 311, holding that where a heavily laden lighter was left by ship's crew secured to the side of the ship, without a watchman, and in the morning was found turned over, the ship was liable on grounds of negligence on the probability that a watchman would have prevented the occurrence; *The Olympia*, 52 Fed. 985, holding that the breaking of a tiller rope purchased from a reputable dealer and tested, was no fault of the ship owner but an unavoidable accident against which no reasonable precaution could have been taken.

Cited in note in 19 Eng. Rul. Cas. 54, on liability for injury due to neglect of statutory precautions.

Cited in 2 *Hutchinson*, Car. 3d ed. 1028, on liability of passenger carrier for safety of intermediate agencies employed; 3 *Elliott*, Railr. 2d ed. 345, on contributory negligence of travelers at railroad crossing; 3 *Thompson*, Neg. 212, on duty of passenger carrier to exercise ordinary care for protection of passenger.

— Acts of third persons.

Cited in *Hinman v. Winnipeg Electric Street R. Co.* 16 Manitoba L. Rep. 16, holding that where horse was killed by electricity escaping from defendant trolley wire through broken telephone wire, the defendant not having control of telephone or street in order to put in guard posts they are not liable; *Grand Rapids & I. R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321, on the right of a railroad company to assume that there is no negligence in others over whom they exercise no control.

Duty of property owner to avoid injury to adjoining property.

Cited in *Dillon v. Hunt*, 11 Mo. App. 246, holding that every owner of property must so use his property as not to create a nuisance or work trespass upon property of adjoining owners.

Cited in 1 *Thompson*, Neg. 967, on liability for injury caused by walls falling upon adjacent premises.

Effect of inevitable accident.

Cited in note in 18 Eng. Rul. Cas. 736, on enhancement by inevitable accident of damages from negligence as a defense.

Liability for acts of contractor not under control.

Cited in *Gillson v. North Grey R. Co.* 35 U. C. Q. B. 475 (dismissing appeal from 33 U. C. Q. B. 128), holding that railway having work done by contractor subject to approval of company engineer, such contractor being told to hurry work and to burn only in center of track but letting fire escape to damage of plaintiff, is alone liable being independent.

Cited in note in 65 L.R.A. 633, 637, on general rules as to absence of liability of employer for torts of independent contractor.

Cited in 1 *White, Pers. Inj. Railr.* 382, on liability for tortious act of independent contractor; 1 *Thompson, Neg.* 592, on liability of proprietor where work of independent contractor is in its nature dangerous and likely to lead to mischief; 1 *Thompson, Neg.* 569, on nonliability of proprietor for wrongful acts of independent contractor.

Distinguished in *McKeegan v. Cape Breton Coal etc. Co.* 40 N. S. 566, holding that where a contractor did certain shoring for defendant submitting to direction and plan of agent of defendant as a matter of choice, such contractor's negligence can be imputed to defendant, he not being an independent contractor.

Reservation of power in judges to draw inferences of fact.

Cited in *Copp v. Reed*, 19 N. B. 455, on the error in entering a formal verdict for plaintiff reserving leave to defendant to move for entry of verdict for him should the court to whom power is reserved to draw inference of fact be of opinion that on the facts the verdict ought to be so entered; *Hood v. Harbour Comrs.* 37 U. C. Q. B. 72 (affirming decision in 33 U. C. Q. B. 148), holding that the power to draw inferences of fact is not confined to court of Queen's Bench but extends to court of appeal.

18 E. R. C. 677, *METROPOLITAN R. CO. v. JACKSON*, L. R. 3 App. Cas. 193, 47 L. J. Q. B. N. S. 303, 37 L. T. N. S. 679, 26 Week. Rep. 175.

Province of court and jury.

Cited in *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; *Carver v. Detroit & S. Pl. Road Co.* 61 Mich. 584, 28 N. W. 721; *Moebus v. Becker*, 46 N. J. L. 41; *Brown v. Vaughan*, 22 N. B. 258,—on relative functions of court and jury; *Cincinnati, I. St. L. & C. R. Co. v. Grames*, 8 Ind. App. 112, 34 N. E. 613, holding that where a special verdict is requested it is for the jury to find the facts established leaving the conclusions of law based thereon to be stated by the court; *Swift v. Langbein*, 62 C. C. A. 111, 127 Fed. 111, on the distinction between the function of the court and that of the jury; *Cowans v. Marshall*, 28 Can. S. C. 161, on definition of issues of negligence by the pleadings and disability of the jury to go outside of them to draw inferences.

Questions for jury.

Cited in *Howe v. Hamilton & N. W. R. Co.* 3 Ont. App. Rep. 336, on the refusal of submission of issue to jury until judge has passed affirmatively in sufficiency of evidence thereon warranting submission; *Murray v. Canada C. R. Co.* 7 Ont. App. Rep. 646; *King v. Toronto R. Co.* Can. Rep. [1908] A. C. 326,—on the sufficiency of evidence for jury; *Stillwell v. Rennie*, 11 Ont. App. Rep. 724, on the remark that there is no evidence to go to the jury, meaning that there is not sufficient evidence on which jury ought to draw an inference based thereon; *Robinson v. Toronto R. Co.* 2 Ont. L. Rep. 18, on evidence proper to be submitted to the jury.

—As to causes and effects.

Cited in *R. v. McLeod*, 8 Can. S. C. 1; *Hawley v. Wright*, 34 N. S. 365,—on

the question of proximity of cause being for the judge after the jury have found that such was the cause; *R. v. Theal*, 21 N. B. 449, holding that where there was evidence that accused kicked his wife in side and knocked her down frequently she dying within a year from inflammation of liver, the evidence was sufficient to go to jury in question of his causing her death.

Non suit or directed verdict.

Cited in *State, Consolidated Traction Co. Prosecutor, v. Reeves*, 58 N. J. L. 573, 34 Atl. 128, on the rule that trial judge cannot order a nonsuit or direct a verdict unless from the facts the jury would not be warranted in reaching any other conclusion; *Linkauf v. Lombard*, 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472, on the duty of the trial judge to non-suit or direct verdict where there is a lack of evidence or preponderance on one side; *Neill v. Travellers' Ins. Co.* 12 Can. S. C. 55, on direction for non-suit in absence of evidence to go to jury; *Rear v. Imperial Bank*, 13 B. C. 345, holding that where cheque was presented at wrong window and there was no evidence of presentment to any other, the court was right in taking the case from jury on issue of presentment; *Rex v. Phinney*, 36 N. S. 264, on duty of court to direct verdict when evidence is insufficient to support any other inference; *McQuay v. Eastwood*, 12 Ont. Rep. 402, holding that where there is no evidence of want of skill or care; or negligence on part of doctor causing injury to plaintiff judgment should be entered for dismissal.

—Where only one verdict is supportable.

Cited in *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Au v. New York, L. E. & W. R. Co.* 29 Fed. 72,—on the rule that evidence will not be submitted to jury where the court would not sustain a verdict unless rendered for certain one of the parties; *Meyer v. Houck*, 85 Iowa, 319, 52 N. W. 235, holding that where the only evidence of fraud between husband and wife was that wife held no note as evidence of debt, her mortgage was not recorded properly and no accounting for sales was made to wife and that husband was at time insolvent and continued in possession, a directed verdict for wife is proper.

—Taking negligence from jury where not decisive of case.

Cited in *Louisville & N. R. Co. v. Webb*, 90 Ala. 185, 11 L.R.A. 674, 8 So. 518, holding that where plaintiff was guilty of contributory negligence, the fact that flagman did not warn him of his danger does not make defendant's negligence a question for the jury; *Creswell v. Wilmington*, 2 Penn. (Del.) 210, 43 Atl. 629, holding that where there is no evidence of actionable negligence, from which the jury would have been justified in drawing such inference, there was no prejudicial error in instruction for verdict for defendant; *Simmons v. Chicago & T. R. Co.* 110 Ill. 340, holding that where deceased voluntarily continued to work in a place of danger in spite of warnings and knowledge of the nature of the work no evidence of negligence of employer could make him liable and a directed verdict is proper; *Hannigan v. International Nav. Co.* 23 W. N. C. 576, holding that where plaintiff put himself in a position of danger and was injured through negligence of defendant's servant, the question of negligence of defendant is not raised as of fact; *Tinsley v. Toronto R. Co.* 15 Ont. L. Rep. 438, holding that where injury is attributable to contributory negligence of plaintiff the question of negligence of defendant does not arise and case should not go to jury; *Gregory v. Cleveland, C. C. & I. R. Co.* 112 Ind. 385, 14 N. E. 228, holding where it appears that decedent was trespassing and it does not appear that death was caused by wilful negligence of defendant a directed verdict for

defendant is proper; *Mann v. Belt R. & Stock Yard Co.* 128 Ind. 138, 26 N. E. 819, holding that where plaintiff had a clear unobstructed view of track for one half mile and did not use care required under such circumstances the fact of negligence of defendant will not be allowed to go to jury but verdict will be directed for defendant; *Latremouille v. Bennington & R. R. Co.* 63 Vt. 336, 22 Atl. 656, holding that where the evidence shows that deceased knowing the dangers of repairing a car in switch yard went under car and was killed, a motion for directed verdict should be entertained; *Illinois C. R. Co. v. Foley*, 3 C. C. A. 589, 10 U. S. App. 537, 53 Fed. 459, holding that a refusal to direct verdict for defendant was proper where it appeared that decedent shipping cattle went to front of train to care for them in dark and in passing around engine fell from a bridge which had no railing.

Negligence as question for jury or court.

Cited in *Jones v. Grand Trunk R. Co.* 45 U. C. Q. B. 193; *McGibbon v. Northern & N. W. R. Co.* 11 Ont. Rep. 307; *Mt. Adams & E. P. Inclined R. Co. v. Lowery*, 20 C. C. A. 596, 43 U. S. App. 408, 74 Fed. 463; *Tucker v. Baltimore & O. R. Co.* 8 C. C. A. 416, 8 U. S. App. 491, 59 Fed. 968; *Hummer v. Lehigh Valley R. Co.* 75 N. J. L. 703, 67 Atl. 1061; *Quinn v. West Jersey & S. R. Co.* 78 N. J. L. 539, 74 Atl. 456; *Vrooman v. North Jersey Street R. Co.* 70 N. J. L. 818, 59 Atl. 459; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 22 L.R.A. 374, 27 Atl. 1067,—on the rule that the court must say whether negligence may be inferred from facts, and jury whether negligence ought to be inferred; *Carpenter v. New York, N. H. & H. R. Co.* 14 Daly, 457, holding that the question of whether a railroad company was guilty of negligence in not properly watching a car to prevent the loss of a passenger's valuables is a question for the jury, and not for the court; *O'Hearn v. Port Arthur*, 4 Ont. L. Rep. 209, on the rule that on any given state of facts it is for the judge to say whether negligence can be rightly inferred and for the jury to say whether it ought to be inferred; *Bennett v. Lovell*, 12 R. L. 166, 34 Am. Rep. 628, on the rule that when facts are undisputed the question of negligence is for court; *Judd v. New York & T. S. S. Co.* 54 C. C. A. 238, 117 Fed. 206, on the rule that where there are no facts tending to establish negligence it is the duty of the court to say so and not leave the issue to the jury; *Denny v. Montreal Teleg. Co.* 3 Ont. App. Rep. 628, on the right and duty of the judge to rule in a proper case that there is or is not evidence of contributory negligence; *Halifax Electric Tramway Co. v. Inglis*, 30 Can. S. C. 256, as settling the rule that whether or not there is reasonable evidence of negligence occasioning the injury as being a question for court and the question whether there was or not evidence from which such negligence can reasonably be inferred as a question for the jury; *Sumner v. Chandler*, 18 N. B. 175, on duty of court to say whether on the evidence the case will or will not go to jury on question of negligence; *Gilmer v. St. John*, 28 N. B. 325, on the province of the judge to say whether there is evidence of negligence or contributory negligence to warrant submission to jury; *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269, holding that the question of negligence of defendant and contributory negligence are for the jury; *Cleghorn v. Thompson*, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605, holding that where all the facts together do not make a case of actionable negligence, and the elements thereof are lacking a demurrer to the evidence should be sustained; *Plefka v. Knapp-Stout Lumber Co.* 72 Mo. App. 309, holding that where plaintiff was injured because of unsafe condition of appliances given to him to work and that they were rendered so by express act and direction of defendant, the circumstances demand that the plaintiff go to the

jury; *Chickering v. Lord*, 67 N. H. 555, 32 Atl. 773, holding that where a colt driven by plaintiff jumped from road broke harness and caused other damage because of the barking of a little dog, a question arises for the jury as to whether plaintiff was contributorily negligent in driving such colt; *Queene Anne's R. Co. v. Reed*, 5 Penn. (Del.) 226, 119 Am. St. Rep. 301, 59 Atl. 860, on the presence of evidence of negligence as a court question, and its sufficiency is one for the jury; *Carter v. Cape Fear Lumber Co.* 129 N. C. 203, 39 S. E. 828, holding that where injuries were caused by slight defects in appliances used, which could not be reasonably anticipated and there was no other evidence of negligence a motion for dismissal should be allowed; *Hall v. McFadden*, 21 N. B. 586, holding that in action for negligence, judge must say whether negligence can be inferred from given state of facts and jury must say whether it ought to be inferred; *Scriver v. Lowe*, 32 Ont. Rep. 290; *Tobin v. Canadian P. R. Co.* 2 D. L. R. 173,—holding that from any given state of facts judge must say whether negligence can legitimately be inferred; *Noble v. Toronto*, 46 U. C. Q. B. 519, holding speculative nature of evidence offered was such that judge could not say whether facts had been established from which negligence might be reasonably inferred or not.

— **Acts or omissions by railroad operatives.**

Cited in *Bittle v. Camden & A. R. Co.* 55 N. J. L. 615, 23 L.R.A. 283, 28 Atl. 305, holding that as to whether the blowing of a whistle causing plaintiff's team to run away was done wantonly or not so as to constitute actionable negligence, should have been submitted to the jury; *Kansas City, Ft. S. & M. R. Co. v. Kirksey*, 9 C. C. A. 321, 22 U. S. App. 94, 60 Fed. 999, holding that it could not be said by court whether defendant was guilty of negligence, where it failed to have track inspected after a heavy rainstorm and after it had been discovered, that one land slide had occurred; *Smith v. Canada P. R. Co.* 34 U. S. 22, holding that where plaintiff in attempting to turn over in her berth was violently thrown to the floor the question as to negligent operation of train and maintenance of track should go to jury.

— **Omission of signals by trainmen.**

Cited in *Philadelphia, W. & B. R. Co. v. Fronk*, 67 Md. 339, 1 Am. St. Rep. 390, 10 Atl. 204, holding that the failure to ring bell at a private crossing where such ringing was not the custom and track was guarded by gates, is not evidence of negligence to go to the jury; *Klanowski v. Grand Trunk R. Co.* 57 Mich. 525, 24 N. W. 801, holding where man was killed in crossing a track after dark, the question of whether train gave a signal or was hid from view by shrubbery was for the jury; *Mitchell v. Boston & M. R. Co.* 68 N. H. 96, 34 Atl. 674, holding that whether an ordinary man possessing same amount of information as to custom to ringing bell before starting engine and other customs of the yard, would have done same as plaintiff did is vital, and a fair question for the jury.

— **Overcrowding in cars of carrier.**

Cited in *Rex v. Toronto R. Co.* 23 Ont. L. Rep. 186, holding that it is duty of railway to protect cars from overcrowding; *Burriss v. Pere Marquette R. Co.* 9 Ont. L. Rep. 259, holding that where from overcrowding plaintiff was forced to sit on steps of car and while there was pushed by swerve of car so as to lose his balance causing injury there was evidence to go to jury on negligence of defendant and their finding will not be disturbed.

— **Closing car door on passenger.**

Cited in *Cashman v. New York, N. H. & H. R. Co.* 201 Mass. 355, 87 N. E. 570, holding that in action against railroad company for injury caused by closing of

elevator door in station upon hand of passenger, no recovery can be had without proof of company's negligence; *Hines v. Boston Elev. R. Co.* 198 Mass. 346, 84 N. E. 475, holding carrier by street railway not liable for slamming of door on passenger's hand at a time of crowding there being no evidence of negligence; *Silva v. Boston & M. R. Co.* 204 Mass. 63, 90 N. E. 547, holding that in action by passenger for injury to hand by its being caught in door of car, recovery might be had where evidence showed that there was defect in catch of door preventing door from working properly; *Maddox v. London, C. & D. R. Co.* 38 L. T. N. S. 458, holding that where plaintiff after entering car but before passing person seated next to door, had his thumb crushed by closing of door by guard there was no evidence to go to the jury on negligence of carrier.

Proximate connection of negligence with the injury.

Cited in *Grant Trunk R. Co. v. Beckett, Cameron* (Can.) 228, on the necessary connection between the injury and the negligence alleged; *Bundy v. Carter*, 21 N. S. 296, holding that where plaintiff's team was damaged in his attempting to regain his place in a line which had been usurped by defendant, the act of defendant was wrongful but did not have proximate connection to damage to render him liable; *Davey v. London & S. W. R. Co.* L. R. 11 Q. B. Div. 213, 53 L. J. Q. B. N. S. 58, L. R. 12 Q. B. Div. 70, 49 L. T. N. S. 739, 48 J. P. 279; *Dublin, W. & W. R. Co. v. Slattery*, L. R. 3 App. Cas. 1155, 39 L. T. N. S. 365, 27 Week. Rep. 191; *Maw v. King & Albion Twps.*, 8 Ont. App. Rep. 248; *Pudsey v. Dominion Atlantic R. Co.* 27 N. S. 498,—on the proximate connection between negligence and the damage sustained.

Cited in notes in 5 Eng. Rul. Cas. 460, on extent of duty to secure safety of passengers; 8 Eng. Rul. Cas. 412, on remoteness of damages.

Cited in 3 Elliott, Railr. 2d ed. 759, on nonliability of employer where negligence was not proximate cause of injury.

Overcrowding of cars as proximate cause.

Cited in *Cobb v. Great Western R. Co.* [1893] 1 Q. B. 459, 62 L. J. Q. B. N. S. 335, 4 Reports, 283, 68 L. T. N. S. 483, 41 Week. Rep. 275, 57 J. P. 437, holding that where plaintiff was robbed because of facilities afforded robber by reason of overcrowding of conveyance, the connection between the robbery and the overcrowding is too remote.

Want of guard or porter as proximate cause.

Cited in *Wright v. Midland R. Co.* 51 L. T. N. S. 539, holding that where railway company was negligent in not having a porter standing at a crossing, and deceased negligently by crossing in front of an approaching train was killed by another train the negligence of the company was not proximate cause of death.

Contributory negligence of passenger.

Cited in *Galveston, H. & S. A. R. Co. v. Davidson*, 61 Tex. 204, on contributory negligence of passenger; *Macdonald v. St. John*, 25 N. B. 318, holding that where a passenger on a ferry boat is injured by the taking down of the protection chain before boat is moored and he thereby caused to fall into space between boat and wharf, he is not contributorily negligent and may recover.

— Traveller at railroad crossing.

Cited in 3 Elliott, Railr. 2d ed. 346, on contributory negligence of travelers at railroad crossing.

Duty of carrier to protect passenger from acts of others.

Cited in *Pounder v. North Eastern R. Co.* [1892] 1 Q. B. 385, 61 L. J. Q. B. N. S. 136, 65 L. T. N. S. 679, 40 Week. Rep. 189, 56 J. P. 247, holding that where

plaintiff employed as evictor of pitmen and in danger of assault from them bought a ticket to ride on defendant's train, such defendant was under no duty to adopt extraordinary precautions to guard him against assault and there was no breach of duty where he was not protected from assault.

Evidence and inferences of negligence or cause of injury.

Cited in *Louisville & N. R. Co. v. Marbury Lumber Co.* 125 Ala. 237, 50 L.R.A. 620, 28 So. 438, holding that, burden being on plaintiff to show negligence in fact, proof that the fire was caused by sparks from engine does not satisfy burden; *Vallee v. Grand Trunk R. Co.* 1 Ont. L. Rep. 224, as having laid down a rule of inference from which later cases endeavored to escape: *Smith v. Hayes*, 29 Ont. Rep. 283, on the inference of negligence from the facts adduced; *Farmer v. Grand Trunk R. Co.* 21 Ont. Rep. 299, holding that where deceased was killed while coupling cars, it not appearing exactly what was cause of death there being indirect evidence to effect that he was killed by lumber projecting from car because of absence of proper states, the action must be dismissed for want of evidence as to cause of death; *Fields v. Rutherford*, 29 U. C. C. P. 113, holding that where the evidence shows that medical men might have pursued some treatment there is no such evidence of malpractice as should go to the jury.

Burden of proving negligence and contributory negligence.

Cited in *Jones v. Grand Trunk R. Co.* 16 Ont. App. Rep. 37, holding that burden of proving that accident was caused by negligent act of defendant and that injured person was not negligent or if he was that defendant could with reasonable care have avoided injuring him, is on the plaintiff.

What constitutes an accident.

Cited in 4 *Elliott, Railr.* 2d ed. 391, on what is an accident to a passenger.

Enhancement by inevitable accident of damages from negligence.

Cited in note in 18 *Eng. Rul. Cas.* 736, on enhancement by inevitable accident of damages from negligence as a defense.

Review of findings founded on inference.

Cited in *Barrett v. Suttis*, 17 N. S. 262, holding that a trial judge's inferences as to negligence are open to review on appeal even though there was evidence to support the inference and a judgment thereon will be reviewed more freely than if based on conflict of testimony; *Brady v. Bell*, 19 N. S. 356, on review of judgment based on inferences being more freely done than where based on conflict of testimony; *Wilson v. Grand Trunk R. Co.* 2 *Dorion (Quebec)* 131, holding that where in case of conflicting testimony, the only testimony against negligence being offered by employees of company, a verdict of negligence ought not to be set aside; *Royal Paper Mills Co. v. Cameron*, 39 *Can. S. C.* 365, holding that where there was evidence from which jury might infer, as to the facts and as no objection was made to instructions and questions asked at the trial their findings will not be disturbed on appeal.

18 E. R. C. 695, *THE DOUGLAS*, 5 *Asp. Mar. L. Cas.* 15, 51 *L. J. Adm. N. S.* 89, 47 *L. T. N. S.* 502, *L. R.* 7 *Prob. Div.* 151, 30 *Week. Rep.* 692.

Liability based on possession and control of wreck.

Cited in *The Snark* [1899] *P.* 74, 68 *L. J. Prob. N. S.* 22, 80 *L. T. N. S.* 25, 47 *Week. Rep.* 398, 8 *Asp. Mar. L. Cas.* 483, 15 *Times L. R.* 170, holding that where possession of wreck is transferred to contractor for raising her the defendants were not relieved from liability for failure to properly indicate its position.

Liability of owners of wrecked vessel or of harbor authorities.

Cited in *The Utopia v. The Primula* [1893] A. C. 492, 62 L. J. Prob. N. S. 118, 1 Reports, 394, 70 L. T. N. S. 47, 7 Asp. Mar. L. Cas. 408, holding that where owners have parted from control and management of their wrecked vessel by undertaking of port authority to indicate its position, then liability so far ceases as to let them out of liability for collision occurring by reason of absence of indication: *The Crystal*, 63 L. J. Prob. N. S. 146 [1894] A. C. 508, 71 T. N. S. 346, holding that where owners abandoned wreck and were paid by underwriters for a total loss and notified harbor authority of abandonment they were not after abandonment such owners as to be liable for expense of removal of wreck by officials.

Cited in note in 59 L.R.A. 59, on right to obstruct or destroy rights of navigation.

Cited in 1 *Farnham Waters*, 416, on obstruction of navigable water by one of public.

Duty of harbor master to remove dangerous obstructions.

Cited in *Dormont v. Furness R. Co.* L. R. 11 Q. B. Div. 496, 52 L. J. Q. B. N. S. 331, 49 L. T. N. S. 134, 5 Asp. Mar. L. Cas. 127, 47 J. P. 711, on the meaning of the word "may" in the statute with respect to removal of dangerous obstructions by harbor master, as being "must."

Enhancement by inevitable accident of damages from negligence.

Cited in note in 18 Eng. Rul. Cas. 736, on enhancement by inevitable accident of damages from negligence as a defense.

18 E. R. C. 715, *VAUGHAN v. MENLOVE*, 3 Bing N. C. 468, 3 Hodges, 51, 1 Jur. 215, 6 L. J. C. P. N. S. 92, 4 Scott, 244, affirming the decision of *Patterson, J.*, reported in 7 Car. & P. 525.

Illegal or negligent doing of legal act.

Cited in *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682, holding that where person duly authorized to sell gunpowder sells a quantity to a child of 8 years, knowing of its incapacity to handle gunpowder properly and the child in ignorance of danger and using care he knew best was injured by explosion the seller is liable: *Radeliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357, on liability for the doing of a lawful act in a manner so negligent as to cause injury: *Austin v. Hudson River R. Co.* 25 N. Y. 334, holding that injury done by excavating in one's own property would not be actionable but where negligently done causing injury to building of adjacent land owner liability attaches.

Actionable use of one's own property or conduct of one's own affairs.

Cited in *Moody v. McClelland*, 39 Ala. 45, 84 Am. Dec. 770, holding that when excavations were so negligently made as to cause injury to adjacent property an action for damages will lie against the person making them: *Vicksburg & J. R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552, holding that owner of unenclosed land must exercise reasonable care and diligence to avoid injuring cattle of others, which may have wandered on premises: *Read v. Pennsylvania R. Co.* 44 N. J. L. 280, as establishing the rule that in the lawful use of one's own property liability does not attach for damage resulting unless caused by negligence: *Congreve v. Morgan*, 4 Duer, 439, holding that person injured by breaking stone covering of vault in sidewalk may recover if any negligence in construction is shown: *Fisher v. Knox*, 13 Pa. 622, 53 Am. Dec. 503, on the use of one's own property in such a way as to cause injury to others through negligence; *Bishop v. Readsboro*

Chair Mfg. Co. 85 Vt. 141, 36 L.R.A. (N.S.) 1171, 81 Atl. 454, holding that one piling lumber on his own land may be liable for injury to neighbor's house by boards being blown against it by such windstorm as might reasonably be expected to occur; *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 544, 42 Fed. 273, on the duty of property owners to exercise due care in the use of their property and their liability for injury resulting from negligent use; *Carson v. Godley*, 26 Pa. 111, 67 Am. Dec. 404, holding negligent construction of a building for a storehouse in such a manner as to cause injury to others by its fall was actionable.

— **Loss from spread of fire.**

Cited in *Bizzell v. Booker*, 16 Ark. 308, holding that when in the use of a fire for cooking in camp it was, through no negligence allowed to get away, the persons having such fire are not liable for damage caused; *Louisville, N. A. & C. R. Co. v. Nitsche*, 126 Ind. 229, 9 L.R.A. 750, 22 Am. St. Rep. 582, 26 N. E. 51, holding that where a railroad in burning off right of way sets fire to bed of peat of which adjacent land consists it is guilty of positive negligence though fire was put out but rekindled by wind and burned adjacent property; *Dorr v. Harkness*, 49 N. J. L. 571, 60 Am. Rep. 656, 10 Atl. 400, on liability for results of starting fire on one's own premises being based on negligence; *Ryan v. New York C. R. Co.* 35 N. Y. 210, 91 Am. Dec. 49, on distinction between liability for consequences of intentional firing and negligent firing; *Canada Southern R. Co. v. Phelps*, 14 Can. S. C. 132; *Spaulding v. Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550,—on the construction of the statute 4 Geo. III. ch. 78, sec. 86, with respect to the inclusion of fires started by negligence; *Booth v. Moffatt*, 11 Manitoba L. Rep. 25, holding that for the uses of husbandry it is proper to use fire on one's land, and persons so using are only liable for negligence; *Kinney v. Morley*, 2 U. C. C. P. 226, holding that where legal negligence has been established, injury resulting from maintenance of a wall on edge of his close in a dilapidated condition is actionable; *Dean v. McCarty*, 2 U. C. Q. B. 448, holding that a person lighting fire on his premises is liable for injury caused to other only through his neglect; *Jaffrey v. Toronto, G. & B. R. Co.* 24 U. C. C. P. 271, holding railroad not protected by statutes of 2 Anne, Ch. 31 and 14 Geo. III. ch. 78, where it negligently allowed combustible matter to gather which was fired by an engine; *Holmes v. Midland R. Co.* 35 U. C. Q. B. 253, holding that where plaintiff cleared his own land for 100 feet back along line of road being employed by company, and left trees where they fell facing the track, the country being new and no facilities for removing such trees, the plaintiff was not negligent in so leaving trees and defendant is liable; *Gillson v. North Grey R. Co.* 35 U. C. Q. B. 475, on the starting of fire by defendant by his negligence as requisite to liability for injury to others; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69, holding that farmers living adjacent to railroad right of way, cannot be deprived of the full ordinary and proper use of their farms by reason of the negligent use of the right of way by the railroad company.

Cited in note in 21 L.R.A. 258, on liability for setting fires which spread to property of others.

Cited in 1 *Thompson, Neg.* 672, on facts which have been held evidence of negligence in setting or guarding fires; 1 *Thompson, Neg.* 669, on statutory restriction in England on onerous liability for loss by fire; *Black, Proof & Pl. Accident Gas.* 76, on presumption of negligence from burning of property; 2 *Underhill, Land & T.* 844, on liability of tenant for insufficiency guarding intentionally kindled fire; 2 *Cooley, Torts*, 3d ed. 1223, on liability for negligent fires.

Distinguished in *Stone v. Boston & A. R. Co.* 171 Mass. 526, 41 L.R.A. 794, 51 N. E. 1, holding railroad company not liable for destruction of adjacent building by ignition of barrels of oil on its platform, by a person not under its control and rightfully on its premises; *McCallum v. Grand Trunk R. Co.* 31 U. C. Q. B. 527, on the use of one's property in the kindling of fires thereon causing injury to others; *Davidson v. Nichols*, 11 Allen, 514, holding where druggist by mistake sold to retailer sulphide of antimony instead of oxide of manganese and a customer of retailer bought, in the wholesale package, and mixed such sulphide taking it for oxide, with potassium chlorate causing explosion, wholesale druggist is not liable.

Liability of a tenant for negligence.

Cited in *Lathrop v. Thayer*, 138 Mass. 466, 52 Am. Rep. 226, holding that liability of tenant for landlord's chattels in possession of tenant depends upon nature of bailment.

Cited in note in 19 E. R. C. 11, on prima facie liability for negligence of occupier of a tenement.

Liability of carrier for negligence.

Cited in *Bleiwise v. Pennsylvania R. Co.* 81 N. J. L. 160, 78 Atl. 1058, holding that injury caused by fall of car window of passenger train could not be said to be result of negligence of company, in failing to inspect, where window was properly inspected on morning of day of accident.

Duty in use of property with respect to one who is at fault.

Cited in *Isbell v. New York & N. H. R. Co.* 27 Conn. 393, 71 Am. Dec. 78, holding that where plaintiff's cattle are at large and are killed while on railroad track by negligent operation of train the company is liable though the cattle were trespassing; *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 172, 62 Am. Dec. 246, on the rule that the mere fact that one party is in the wrong does not excuse absence of due care on the other party.

Fire as proximate cause.

Cited in *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608, holding that where coals from engine fell on horse causing it to run away and driver in attempting to arrest its progress drove it against curb and plaintiff being on sidewalk was injured by vehicle passing over curb the company was liable, the negligence in allowing escape of coals being proximate cause.

Distinguished in *Gaston v. Wald*, 19 U. C. Q. B. 586, holding that fire communicating from a stove to fuel left nearby was accidental within terms of statute.

Degree of care and negligence.

Cited in *Moore v. Westervelt*, 27 N. Y. 234, holding that where sheriff took replevied goods into his own possession an instruction that he is bound to the most extraordinary diligence and that slightest neglect is culpable negligence, is too strong and favorable to plaintiff; *Seranton v. Baxter*, 4 Sandf. 5, holding that where defendant was gratuitously loaned the use of a horse and he returned the same by a servant through whose carelessness the horse was killed, the defendant is liable his duty being the highest degree of care; *Jordan v. Wyatt*, 4 Gratt. 151, 47 Am. Dec. 720, on the requirement of a greater degree of negligence to establish liability in an action on the case than by the action of trespass, not being supported by reason or authority.

Cited in 1 Morse, Banks, 4th ed. 421, on gross negligence as test of bank's liability for special deposit.

— As affected by notice of danger.

Cited in Hoyt v. Jeffers, 30 Mich. 181, holding that where defendant had been warned of the danger his mill was causing by escape of sparks, such notice made him liable for a higher degree of care and made the continuance of the condition of spark arrester negligence when without notice it would not have been; Blyth v. Birmingham Waterworks Co. 18 E. R. C. 621, 11 Exch. 781, 25 L. J. Exch. N. S. 212, 2 Jur. N. S. 333, on the probability of fire from the negligent construction of hay rick and notice of the danger therefrom.

— Test for care and skill.

Cited in Hainlin v. Budge, 56 Fla. 342, 47 So. 825, on meaning of term "reasonably prudent man" in actions for personal injuries caused by negligence; Smith v. Hannibal & St. J. R. Co. 37 Mo. 287, on the requirement of reasonable skill, care and foresight such as might be expected of reasonably prudent man under same circumstances; Prosser v. Montana C. R. Co. 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81, on the conduct of a prudent man as being the criterion for the jury in finding on negligence; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264, 5 Am. Crim. Rep. 391, holding that where physician by foolhardy treatment of patient caused her death, an instruction on trial that he was "to be tried by no other or higher standard of skill than that which he necessarily assumed in treating her" was proper being the care used by ordinary man in same circumstances; Staloch v. Holm, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264, holding that a man's best judgment is not the standard by which to judge his conduct with respect to negligence but the standard is the conduct of an ordinarily prudent man under the same circumstances; Tucker v. Heniker, 41 N. H. 317, holding that an instruction restricting the standard of conduct to a class instead of to mankind in general is erroneous; Hyde v. Jamaica, 27 Vt. 443, holding that where person was drowned in fording stream over which defendants neglected to rebuild bridge, the question of due care is not affected by that person's personal confidence or belief which he may have had as to the safety in fording; The Germanic (Oceanic Steam Nav. Co. v. Aitken) 196 U. S. 589, 49 L. ed. 610, 25 Sup. Ct. Rep. 317, holding that the standard of conduct with respect to negligence is external and takes no account of the personal belief or judgment of the person concerned; Upton v. Pingree, 7 N. B. 186, holding charge, that tenant who stored lime so that high tide came in and caused burning of the building, was not liable unless guilty of gross negligence, was correct in view of further charge calling for ordinary care to foresee the result.

Negligence as question for jury.

Cited in St. Paul v. Kuby, 8 Minn. 125, Gil. 125, on the question of negligence as being of fact and for the determination of the jury; Levine v. D. Wolff & Co. 78 N. J. L. 306, 138 Am. St. Rep. 617, 73 Atl. 73, holding that question as to whether warehouseman used care required by law where he took goods and left them in stable upon wagon, was one of fact; Seabrook v. Hecker, 2 Robt. 291, holding that question of negligence was for jury where plaintiff's house was injured by wall on adjoining premises falling against it, if there was any evidence of negligence in construction of wall; Shobert v. May, 40 Or. 68, 55 L.R.A. 810, 91 Am. St. Rep. 453, 66 Pac. 466, holding that where the evidence was conflicting as to whether a bar before an elevator opening was completely down or up at one end, it is the province of the jury to decide as to

whether due care was used or not; *Lamb v. Camden & A. R. & Transp. Co.* 2 Daly, 454, holding that where goods were burned in transit the question of due care is for the jury taking into consideration all the circumstances; *Congreve v. Morgan*, 4 Duer, 439, on jury findings of negligence using the care taken by a prudent man as a rule of guidance; *Creaser v. Creaser*, 41 N. S. 480, on negligence in use of fire as jury question.

18 E. R. C. 726, *SMITH v. LONDON & S. W. R. CO.* 40 L. J. C. P. N. S. 21, L. R. 6 C. P. 14, 23 L. T. N. S. 678, 19 Week Rep. 230, affirming the decision of the Court of Common Pleas, reported in L. R. 5 C. P. 98.

Evidence and inferences of negligence.

Cited in *McCallum v. Grand Trunk R. Co.* 31 U. C. Q. B. 527, on the question as to whether the facts were sufficient to go to the jury on the question of negligence.

Cited in 2 *Thompson*, Neg. 847, on negligence in communicating fire being provable wholly by circumstantial evidence.

— Failure to foresee result.

Cited in *Jones v. East Carolina R. Co.* 142 N. C. 207, 55 S. E. 147, on importance of what a reasonable man might have foreseen where there is no direct evidence of negligence for the jury.

The decision of the Court of Common Pleas was cited in *Kearney v. Chicago, M. & St. P. R. Co.* 47 Wis. 144, 2 N. W. 82, on the rule that contributory negligence must be left to the jury where a fair doubt exists in the mind as to whether the act would have been done by an ordinarily prudent man.

— Fires from locomotives.

Cited in *St. Louis & S. F. R. Co. v. Dodd*, 59 Ark. 317, 27 S. W. 227, holding that there was evidence to sustain a finding of negligence where defendant's depot was burned containing plaintiff's goods, the depot being surrounded by cotton taking fire and burning depot a few minutes after passing of a train: *St. Louis, I. M. & S. R. Co. v. Coombs*, 76 Ark. 132, 88 S. W. 595, 6 Ann. Cas. 151, holding that where a building thirty-four feet from track was discovered to be afire a few minutes after passing of locomotive the inference that fire was communicated by sparks from engine is justified: *Kansas City, Ft. S. & M. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 876, holding jury warranted in finding that fire was caused by operation of engines where a few minutes after passing of train a highly inflammable field was discovered to be burning ahead of wind blowing away from direction of track: *Woodson v. Milwaukee & St. P. R. Co.* 21 Minn. 60, holding that where fires had started after passing of train, season being dry and high wind blowing, coals being found lying in the grass where fire started immediately after passing of train, there was sufficient evidence to go to jury that the fire started from the engine: *Karsen v. Milwaukee & St. P. R. Co.* 29 Minn. 12, 11 N. W. 122, holding that jury were warranted in finding that fire started from sparks where the evidence tended to show that fire started in grass shortly to leeward of track a few minutes after passing of train and there was a stiff breeze and no person or other fire in the vicinity at the time: *Big River Lead Co. v. St. Louis, I. M. & S. R. Co.* 123 Mo. App. 394, 101 S. W. 636, holding that an inference that fire was started by sparks from engine is warranted by evidence of high wind, proximity of building burned, and of fires starting on roof toward track that train passed on immediately preceding: *Diamond v. Northern P. R. Co.* 6 Mont. 580, 13 Pac. 367, holding that in actions against railroad companies for damages resulting

from sparks of fire from locomotive, negligence will be presumed from proof of accident and injury; *Kelsey v. Chicago & N. W. R. Co.* 1 S. D. 80, 45 N. W. 204, holding that proof of origin of fire from sparks from engine raises a presumption that defendant was negligent in operation or construction of engine and shifts burden to defendant of proving proper operation and construction; *Toledo, St. L. & W. R. Co. v. Star Flouring Mills Co.* 77 C. C. A. 203, 146 Fed. 953, on the proposition that very slight evidences of the emission of sparks, presence of combustible matter on track, and dryness of season, is enough to make a *prima facie* case of negligence requiring evidence of due care in rebuttal by defendant.

Cited in *Black, Proof & Pl. Accident Cas.* 77, on presumption of negligence from destruction of property by sparks from locomotive; 2 *Thompson, Neg.* 837, on presumption of negligence from fact of fire being communicated from locomotive.

The decision of the Court of Common Pleas was cited in *Dyer v. Maine C. R. Co.* 99 Me. 195, 67 L.R.A. 416, 58 Atl. 994, 2 Ann. Cas. 457, holding that it is a fair inference that fire was communicated by sparks where it appears that there was no fire before passing of train but that it was discovered shortly after in grass on banks of track extending to plaintiff's buildings which were consumed.

—Accumulation of grass and other combustibles beside railroad.

Cited in *Tilley v. St. Louis & S. F. R. Co.* 49 Ark. 535, 6 S. W. 8, holding that it is not negligence per se to permit dry grass and vegetation to remain on right of way but merely a circumstance upon which inference of negligence may be drawn; *Smith v. Central Vermont R. Co.* 80 Vt. 208, 67 Atl. 535, holding that where company has suffered combustible matter to accumulate on track it is not necessary for recovery to show negligence in operation or construction of locomotive nor to show what particular engine started the fire; *Flannigan v. Canadian P. R. Co.* 17 Ont. Rep. 6, holding that the presence of dry grass on right of way in dry season warrants an inference of negligence and the question should be submitted to jury; *Jaffrey v. Toronto, G. & B. R. Co.* 23 U. C. C. P. 553, on the duty to keep track free from combustible matter to reasonable extent being a reasonable precaution against communication of fire by sparks; *Rainville v. Grand Trunk R. Co.* 25 Ont. App. Rep. 242, holding that where all reasonable precautions are taken to prevent fire the company are not liable for consequences, one of such precautions being to remove combustible matter accumulated from year to year.

The decision of the Court of Common Pleas was cited in *Stephenson v. Pennsylvania R. Co.* 20 Pa. Super Ct. 157, holding that where there was evidence that defendant company permitted accumulation of combustible matter on its right of way and a fire started there from sparks from passing engine, company was guilty of negligence; *Rainville v. Grand Trunk R. Co.* 25 Ont. App. Rep. 242, holding that railroad company is liable for damage caused by fire which started by sparks from engine in dead grass along track; *Salmon v. Delaware, L. & W. R. Co.* 38 N. J. L. 5, 20 Am. Rep. 356, holding that railroad company is bound to keep its tracks and contiguous land clear of materials likely to be ignited from sparks; *Gibbons v. Wisconsin Valley R. Co.* 58 Wis. 335, 17 N. W. 132, holding that whether it is negligence to leave combustible matter upon right of way in any particular place, liable to ignition from sparks, is a question for the jury; *Furlong v. Carroll*, 7 Ont. App. Rep. 145, on the rule that the

allowing of combustible matter on right of way, causing communication of fire to adjacent property may be actionable negligence.

Liability for spread of fire.

Cited in *Laidlaw v. Crow's Nest Southern R. Co.* 14 B. C. 169, holding that a railroad company was not liable for a fire which spread from its property to adjoining property where there was no clear proof that sparks from an engine caused the fire in the first place.

Cited in notes in 21 L.R.A. 260, on liability for setting fires which spread to property of others; 18 Eng. Rul. Cas. 725, on liability for injury to neighbor from improper use of one's own land.

Proximate cause.

Cited in *Texas & P. R. Co. v. Howell*, 224 U. S. 577, 56 L. ed. 892, 32 Sup. Ct. Rep. 601, holding that jury is warranted in finding that tuberculosis of spine is direct result of injury from falling timber, where there was ample evidence that blow occasioned development of disease, though it was not discovered to be such for over year; *Christianson v. Chicago, St. P. M. & O. R. Co.* 67 Minn. 94, 69 N. W. 640; *Illinois C. R. Co. v. Creighton*, 63 Ill. App. 165; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L.R.A. 215, 32 N. E. 285,—on the rule that where the consequences run in unbroken sequence from the wrong to the injury, without an intervening efficient agency, it is sufficient, if at the time of injury the wrongdoer might by the exercise of ordinary care, have foreseen that some injury might result from the negligence: *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583, 6 L.R.A. 193, 21 N. E. 968, holding that where passenger is injured after leaving train by falling into unguarded hole in a platform between depot of defendant and that of another carrier, the negligence of defendant in maintaining such platform is proximate cause of injury; *Toms v. Whitby Twp.* 35 U. C. Q. B. 195, holding that where horse became frightened at new planks in bridge and backed over the unrailed edge injuring driver, the failure to provide proper railing was proximate cause of damage and not fright of horse.

Cited in 1 *Nellis*, St. Rys. 2d ed. 484, on what is the proximate cause of an injury; 1 *White*, Pers. Inj. Railr. 26, on tests for determining proximate cause of injury.

The decision of the Court of Common Pleas was cited in *Ryan v. Gross*, 68 Md. 377, 12 Atl. 115, on rule that where the wrong or neglect in its natural and direct course, without any intervening force or power was the cause of injury the wrong is the proximate cause thereof; *Spelman v. Jaffray*, 22 Abb. N. C. 377, on liability where the connection between negligence and injury is immediate; *Snyder v. Pittsburgh, C. & St. L. R. Co.* 11 W. Va. 14, on the rule that an efficient adequate cause being found, must be deemed to be the true cause unless some independent cause intervenes and that liability attaches to all injurious consequences flowing directly and naturally from the true cause; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69, holding that efficient adequate cause being found, must be deemed true cause, unless some other cause, not incidental to it, is shown to have intervened between it and result.

—Consequences not particularly foreseen.

Cited in *Hoepper v. Southern Hotel Co.* 142 Mo. 378, 44 S. W. 257, holding that even though the effect or result of the negligent act could not have been reasonably foreseen the liability for damage attaches so long as it was an immediate and direct consequence of the act, providing negligence has been

established; *Chicago, R. I. & P. R. Co. v. Stepp*, 22 L.R.A.(N.S.) 350, 90 C. C. A. 431, 164 Fed. 785, holding that where defendant train was run past another train discharging and taking on passengers at rate of forty miles per hour, that in itself was negligence and the fact that the stepping of deceased in front of train could not have been foreseen is of no consequence; *Selleck v. Lake Shore & M. S. R. Co.* 93 Mich. 375, 18 L.R.A. 154, 53 N. W. 556, holding that where injury is caused by negligence per se whether the cause was proximate or remote is not material, liability attaching for all consequences; *Miller v. St. Louis, I. M. & S. R. Co.* 90 Mo. 389, 2 S. W. 439; *Harrison v. Kansas City Electric Light Co.* 195 Mo. 606, 7 L.R.A.(N.S.) 293, 93 S. W. 951; *Foley v. McMahon*, 114 Mo. App. 442, 90 S. W. 113; *Hudson v. Atlantic Coast Line R. Co.* 142 N. C. 198, 55 S. E. 103; *Isham v. Dow*, 70 Vt. 588, 45 L.R.A. 87, 67 Am. St. Rep. 691, 41 Atl. 585; *Hammill v. Pennsylvania R. Co.* 56 N. J. L. 370, 24 L.R.A. 531, 29 Atl. 151,—on liability of person guilty of negligence for consequences whether he could have foreseen them or not; *Chicago, R. I. & P. R. Co. v. Moore*, 36 Okla. 450, 43 L.R.A.(N.S.) 701, 129 Pac. 67, holding that when negligence is once established, person guilty of it is liable for consequences whether he could have foreseen them or not. *Tremain v. Halifax Gas Co.* 9 N. S. 360, on the rule that it is no defense that the damages were greater than could be anticipated.

—Fires and other elemental destroyers.

Cited in *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.* 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45, holding that where goods are lost by flood while in possession of carrier because of unreasonable delay in shipment such delay is the reasonable and probable cause of such loss; *Waddell v. Chicago & A. R. Co.* 146 Mo. App. 604, 124 S. W. 588, holding that in action under statute making railroad liable for injury by fires from locomotives, it is necessary to show that fire came from locomotive and not from other part of train; *Gilson v. Delaware & H. Canal Co.* 65 Vt. 213, 36 Am. St. Rep. 802, 26 Atl. 70, holding that where water was diverted artificially into a quarry and because of weakness of dividing wall between it caused by encroachments of plaintiff years before, the wall broke letting in the water, the weakening of wall was not proximate cause but the act of defendant in diverting water; *White v. Colorado C. R. Co.* 5 Dill. 428, Fed. Cas. No. 17,543, holding that where carrier placed kegs of powder in warehouse with plaintiff's goods he was guilty of negligence and that in a fire firemen were hindered from saving goods because of presence of powder, the presence of the powder is proximate cause of loss.

Cited in 2 *Thompson, Neg.* 854, on application of doctrine of proximate and remote cause in case of railroad fires.

The decision of the Court of Common Pleas was cited in *Fent v. Toledo, P. & W. R. Co.* 59 Ill. 349, 14 Am. Rep. 13, holding that where plaintiff's house was burned by ignition from a burning warehouse set on fire by cinders from passing train the railroad company is liable, the cinders being the proximate cause of firing of plaintiff's house; *Butcher v. Vaca Valley & C. L. R. Co.* 2 Cal. Unrep. 427, 5 Pac. 359, holding that whether destruction of plaintiff's property was caused by fire kindled on his premises by sparks which came directly to land from locomotive, or by fire kindled on adjoining land from same source, would not affect defendant's liability; *Annapolis & E. R. Co. v. Gantt*, 39 Md. 115, on proximate cause in case of fire started on right of way and spreading therefrom; *Webb v. Rome, W. & O. R. Co.* 49 N. Y. 420, 10 Am. Rep. 389,

on the liability of one who creating a fire on his own property, through negligence, spreads it to the destruction of adjacent property.

—As question for jury.

Cited in *Brown v. Benson*, 98 Ga. 372, 25 S. E. 455, holding that where plaintiff's woods were burned, there being evidence warranting inference that fire originated from sparks from locomotive lodging in straw on right of way thence to woods, the question should have gone to jury.

The decision of the Court of Common Pleas was cited in *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, on proximity of cause as being a question for jury; *Atkinson v. Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764, holding that the true rule is that proximate cause is to be determined as a fact in view of attendant circumstances and is ordinarily a question for the jury.

Negligence as to casualties not reasonably to have been anticipated.

Cited in *Baltimore & O. R. Co. v. Wheeling, P. & C. Transp. Co.* 32 Ohio St. 116, holding that where barge engaged in construction of bridge was left in navigable water without a light the act is not negligent if the place was not used as passage way for vessels a light not being reasonably considered necessary; *Texas & P. R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162, on the rule that there is no legal duty to guard against that which cannot be reasonably foreseen.

Negligence as basis of railway operator's liability for fires.

Cited in *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243, on the liability of railroad companies for starting fires by sparks and coals from operating engines being one based on negligence; *Canadian P. R. Co. v. Roy*, Rap. Jud. Quebec 9 B. R. 551, on the effect of the statute authorizing use of locomotives as taking away the common law liability and substituting liability for negligence only.

Duty of railway company as to condition of right of way, and proper operation of locomotives.

Cited in *Jones v. Michigan C. R. Co.* 59 Mich. 437, 26 N. W. 662, on the settled rule that a railroad company must keep its right of way free from dangerous combustible matter and that failure to do so resulting in damage by fire involves the company in liability therefor; *Canada Southern R. Co. v. Phelps*, 14 Can. S. C. 132, on the proposition that legislature having granted railroads the right to use steam engines as a motive power, placed a burden on the user to see that all precautions known to science be used to prevent injury and any breach of that duty involves liability to extent of natural consequences; *Jaffrey v. Toronto, G. & B. R. Co.* 24 U. C. C. P. 271, holding that where the road was in new country and plaintiff's premises were in state of nature the allowing of grass to grow on right of way was not negligence; *Holmes v. Midland R. Co.* 35 U. C. Q. B. 253, on the right of a railroad company to maintain brush and liability for its communication of fire.

The decision of the Court of Common Pleas was cited in *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 299, 23 Am. Rep. 214, on common law duty of railroads to keep their right of way free from combustible matter, and holding an action will lie for negligence where fire starts in such matter although there be no improper operation or construction of engine; *Kellogg v. Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69, holding that farmers adjoining tracks of railroads are not under duty to guard against fire caused by operation of

trains, but that it is the duty of railroad to keep right of way in such condition that fires will not under ordinary circumstances originate thereon; *Moxley v. Canada Atlantic R. Co.* 14 Ont. App. Rep. 309, on negligence consisting of allowing combustible matter to accumulate on right of way.

Form of action for negligent spread of fire.

Cited in *Brereton v. Canadian P. R. Co.* 29 Ont. Rep. 57, on distinction between "case" for spread of fire producing damage and "trespass."

Definition of negligence.

Cited in *Ide v. Boston & M. R. Co.* 83 Vt. 66, 74 Atl. 401; *Western U. Teleg. Co. v. Catlett*, 100 C. C. A. 489, 177 Fed. 71,—holding that anticipation of danger is element of actionable negligence only, when character of act is doubtful, and has no bearing upon liability if negligence exists.

Cited in note in 18 Eng. Rul. Cas. 625, on what constitutes negligence.

The decision of the Court of Common Pleas was cited in *Kearney Electric Co. v. Laughlin*, 45 Neb. 390, 63 N. W. 941, approving cited definition of negligence given in an instruction although not qualified by words "under the circumstances."

Inevitable accident.

Cited in note in 1 Eng. Rul. Cas. 214, on what constitutes an inevitable accident.

Statutory excuse for accident.

Cited in note in 1 Eng. Rul. Cas. 303, on nonliability of public associations or corporations for accidents occurring through use of statutory powers.

— Contributory negligence.

The decision of the Court of Common Pleas was cited in *Butler v. Milwaukee & St. P. R. Co.* 28 Wis. 487, holding that instruction that if decedent might have seen the cars approaching by looking he was guilty of negligence is proper the question of contributory negligence under all the circumstances of the case being for the jury.



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Hilo, Hawaii

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